SB 49

January 18, 1983

Honorable John Conyers, Jr.
2313 Rayburn
House Office Building
Washington, D.C. 20515

RE: Exclusionary Rule

Dear Representative Conyers:

I have been advised that you are the chairman of the House Judiciary Subcommittee on Criminal Justice and that you have recently held hearings regarding the proposed "good faith exception" to the exclusionary rule.

I am counsel for the Alaska State Senate Judiciary Committee and I anticipate that we will be dealing with the same issue in the near future.

Therefore, I would sincerely appreciate whatever information you may care to share with us concerning this interesting and complex subject, especially drafts of proposed legislation, copies of pertinent articles or transcripts of your hearings.

I have already contacted Marie Johnson of the Police Executive Research Forum and I have obtained copy of Professor Wasserstrom's recent law review article on the subject.

Very truly yours,

John C. Gabrielli
Counsel

Ex-Rule

January 19, 1983

Honorable Dennis DeConcini
3230 Dirksen
Senate Office Building
Washington, D.C. 20510

Dear Senator DeConcini:

I have been advised that in the first session of the 97th Congress you introduced a bill (SB 101) prohibiting the suppression of evidence in a federal criminal proceeding unless the law enforcement officer's violation of the fourth amendment was intentional or substantial.

I am legal counsel to the Alaska Senate Judiciary Committee and I would sincerely appreciate a copy of your previously mentioned bill, along with whatever other information you may care to share regarding the subject in question.

Very truly yours,

John C. Gabrielli
Counsel

Exclusionary Rule

January 19, 1983

Honorable John Vasconcellos
State Capitol Building, Rm 3091
Sacramento, California 98514

Dear Assemblyman Vasconcellos:

A ne'er-do-well disc jockey in Anchorage, Alaska, named John Gaar said that if I ever needed assistance I should contact you...

I am legal counsel to the Alaska Senate Judiciary Committee and I need a copy of:

Assembly Constitutional Amendment 31,
1981-82 session of the California
Legislature

Of course, if I can ever reciprocate, please let me know, and if you are ever in our area, please contact me. Gaar says that you're very fond of choclate covered muktuk and I know the best places that serve it in our town.

Very truly yours,

John C. Gabrielli
Counsel

id., at 171, while Elbridge Gerry thought Pinckney's idea might "enslave the States." *Id.*, at 165. After much debate, the Convention rejected Pinckney's suggestion.

Late in July, the delegates reversed their approval of even Randolph's more moderate congressional veto. Several delegates now concluded that the negative would be "terrible to the States," "unnecessary," and "improper." 2 Farrand 27.[8] Omission of the negative, however, left the new system without an effective means of adjusting conflicting state and national laws. To remedy this defect, the delegates adopted the Supremacy Clause, providing that the federal Constitution, laws, and treaties are "the supreme Law of the Land" and that "the Judges in every State shall be bound thereby." Art. VI, cl. 2. Thus, the Framers substituted judicial review of state laws for congressional control of state legislatures.

While this history demonstrates the Framers' commitment to a strong central government, the means that they adopted to achieve that end are as instructive as the end itself.[9] Under the Articles of Confederation, the national legislature operated through the States. The Framers could have fortified the central government, while still maintaining the same system, if they had increased Congress' power to demand obedience from state legislatures. In time, this scheme might have relegated the States to mere departments of the National Government, a status the Court appears to endorse today. The Framers, however, eschewed this course, choosing instead to allow Congress to pass laws directly affecting individuals, and rejecting proposals that would have given Congress military or legislative power over state governments. In this way, the Framers established independent state and national sovereigns. The National Government received the power to enact its own laws and to enforce those laws over conflicting state legislation. The States retained the power to govern as sovereigns in fields that Congress cannot or will not preempt.[10] This product of the Constitutional Convention, I believe, is fundamentally inconsistent with a system in which either Congress or a state legislature harnesses the legislative powers of the other sovereign.[11]

III

During his last Term of service on this Court, Justice Black eloquently explained that our notions of federalism subordinate neither national nor state interests:

> "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger* v. *Harris*, 401 U. S. 37, 44 (1971).

In this case, I firmly believe that a proper "sensitivity to the legitimate interests of both State and National Governments" requires invalidation of Titles I and III of PURPA insofar as they apply to state regulatory authorities. Accordingly, I respectfully dissent from the Court's decision to uphold those portions of the statute.

REX E. LEE, Solicitor General of the United States, Justice Department, Washington, D.C. (CAROL E. DINKINS, Assistant Attorney General, LOUIS F. CLAIBORNE, Deputy Solicitor General, ELLIOTT SCHUDER, Assistant to the Solicitor General, KATHRYN A. OBERLY, and SUSAN VIRGINIA COOK, Justice Department attorneys, CHARLES A. MOORE, General Counsel, JEROME M. FEIT, Deputy Solicitor, and JOANNE LEVEQUE, Federal Energy Regulatory Commission attorney, with him on the brief) for appellants; ALEX A. ALSTON, JR., Jackson, Miss. (JAMES T. McCAFFERTY, III, THOMAS, PRICE, ALSTON, JONES & DAVIS, HIRAM C. EASTLAND, JR., CROSTHWAIT, TERNEY, NOBLE & EASTLAND, BILL ALLAIN, Attorney General of Mississippi and BENNETT E. SMITH, Assistant Attorney General and Attorney for the Mississippi Public Service Commission, with him on the brief) for appellees.

No. 80-2209

UNITED STATES, PETITIONER v. ALBERT ROSS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

No. 80-2209. Argued March 1, 1982—Decided June 1, 1982

Acting on information from an informant that a described individual was selling narcotics kept in the trunk of a certain car parked at a specified location, District of Columbia police officers immediately drove to the location, found the car there, and a short while later stopped the car and arrested the driver (respondent), who matched the informant's description. One of the officers opened the car's trunk, found a closed brown

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[8] Thomas Jefferson disapproved of the congressional veto as soon as he heard of it. Writing to Madison from Paris, he declared: "The negative proposed to be given [the national legislators] on all the acts of the several Legislatures is now for the first time suggested to my mind. Prima facie I do not like it." C. Warren, The Making of the Constitution 168 (1937). Notably, Jefferson suggested that "an appeal from the State Judicatures to a Federal Court, in all cases where the Act of Confederation controuled the question, [would] be as effectual a remedy." *Id.*, at 168–169.

[9] Experience under the Articles of Confederation taught the Framers that multiple state legislatures, unchecked by any central power, "threat[en] danger not to the harmony only, but to the tranquillity of the Union." Warren, *supra* n. 32, at 166 (quoting Madison). My analysis of the Framers' intent does not detract from the proper role of federal power in a federalist system, but merely requires the exercise of that power in a manner that does not destroy state independence.

[10] This Court quickly recognized that Congress' strength derives from its own enumerated powers, not from the ability to direct state legislatures. In *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819), the historic decision affirming Congress' power to establish a national bank, Chief Justice Marshall declared: "No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; *and on those means alone was it expected to rely for the accomplishment of its ends.*" *Id.*, at 424 (emphasis added). See also S. Davis, The Federal Principle 114 (1978) (after examining history of Constitutional Convention, "only the principle of *duality* articulated in a single constitutional system of two distinct governments, national and state, each acting in its own right, each acting directly on individuals, and each qualified master of a limited domain of action, stands out as the clearest fact"); Salmon, *supra*, n. 13, at 359 (discussing history of Constitutional Convention and concluding that substitution of Supremacy Clause for negative on state laws "evidenced the clear distinction in [the Framers'] minds between the supremacy of the nation, which they approved, and the power of the nation to control the functioning of the states, which they rejected").

[11] After the Convention, several thinkers suggested that the National Government might rely upon state officers to perform some of its tasks. Madison, for example, thought that Congress might rely upon state officials to collect national revenue. The Federalist No. 45, pp. 312–313 (J. Cooke ed. 1961). None of these suggestions, however, went so far as to propose congressional control of state legislative power. The suggestions, moreover, seemed to assume that the States would consent to national use of their officials. See also W. Anderson, The Nation and the States, Rivals or Partners? 86–87 (1955) (noting that First Congress rejected proposals to rely upon state officials to enforce federal law and suggesting that this decision to leave "the states free to work out, and to concentrate their attention and resources upon, their own functions" has become part of our constitutional understanding).

paper bag, and after opening the bag, discovered glassine bags containing white powder (later determined to be heroin). The officer then drove the car to headquarters, where another warrantless search of the trunk revealed a zippered leather pouch containing cash. Respondent was subsequently convicted of possession of heroin with intent to distribute—the heroin and currency found in the searches having been introduced in evidence after respondent's pretrial motion to suppress the evidence had been denied. The Court of Appeals reversed, holding that while the officers had probable cause to stop and search respondent's car—including its trunk—without a warrant, they should not have opened either the paper bag or the leather pouch found in the trunk without first obtaining a warrant.

Held: Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant.

(a) The "automobile exception" to the Fourth Amendment's warrant requirement established in *Carroll* v. *United States*, 267 U. S. 132, applies to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. In this class of cases, a search is not unreasonable if based on objective facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.

(b) However, the rationale justifying the automobile exception does not apply so as to permit a warrantless search of any movable container that is believed to be carrying an illicit substance and that is found in a public place—even when the container is placed in a vehicle (not otherwise believed to be carrying contraband). *United States* v. *Chadwick*, 433 U. S. 1; *Arkansas* v. *Sanders*, 442 U. S. 753.

(c) Where police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search. The scope of the search is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. For example, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

(d) The doctrine of *stare decisis* does not preclude rejection here of the holding in *Robbins* v. *California*, 453 U. S. 420, and some of the reasoning in *Arkansas* v. *Sanders*, *supra*.

—— U. S. App. D. C. ——, 655 F. 2d 1159, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN and POWELL, JJ., filed concurring opinions. WHITE, J., filed a dissenting opinion. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined.

JUSTICE STEVENS delivered the opinion of the Court.

In *Carroll* v. *United States*, 267 U. S. 132, the Court held that a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment. The Court in *Carroll* did not explicitly address the scope of the search that is permissible. In this case, we consider the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view. We hold that they may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant "particularly describing the place to be searched."[1]

I

In the evening of November 27, 1978, an informant who had previously proved to be reliable telephoned Detective Marcum of the District of Columbia Police Department and told him that an individual known as "Bandit" was selling narcotics kept in the trunk of a car parked at 439 Ridge Street. The informant stated that he had just observed "Bandit" complete a sale and that "Bandit" had told him that additional narcotics were in the trunk. The informant gave Marcum a detailed description of "Bandit" and stated that the car was a "purplish maroon" Chevrolet Malibu with District of Columbia license plates.

Accompanied by Detective Cassidy and Sergeant Gonzales, Marcum immediately drove to the area and found a maroon Malibu parked in front of 439 Ridge Street. A license check disclosed that the car was registered to Albert Ross; a computer check on Ross revealed that he fit the informant's description and used the alias "Bandit." In two passes through the neighborhood the officers did not observe anyone matching the informant's description. To avoid alerting persons on the street, they left the area.

The officers returned five minutes later and observed the maroon Malibu turning off Ridge Street onto Fourth Street. They pulled alongside the Malibu, noticed that the driver matched the informant's description, and stopped the car. Marcum and Cassidy told the driver—later identified as Albert Ross, the respondent in this action—to get out of the vehicle. While they searched Ross, Sergeant Gonzales discovered a bullet on the car's front seat. He searched the interior of the car and found a pistol in the glove compartment. Ross then was arrested and handcuffed. Detective Cassidy took Ross' keys and opened the trunk, where he found a closed brown paper bag. He opened the bag and discovered a number of glassine bags containing a white powder. Cassidy replaced the bag, closed the trunk, and drove the car to Headquarters.

At the police station Cassidy thoroughly searched the car. In addition to the "lunch-type" brown paper bag, Cassidy found in the trunk a zippered red leather pouch. He unzipped the pouch and discovered $3,200 in cash. The police laboratory later determined that the powder in the paper bag was heroin. No warrant was obtained.

Ross was charged with possession of heroin with intent to distribute, in violation of 21 U. S. C. §841(a). Prior to trial, he moved to suppress the heroin found in the paper bag and the currency found in the leather pouch. After an evidentiary hearing, the District Court denied the motion to suppress. The heroin and currency were introduced in evidence at trial and Ross was convicted.

A three-judge panel of the Court of Appeals reversed the conviction. It held that the police had probable cause to stop and search Ross' car and that, under *Carroll* v. *United States*, *supra*, and *Chambers* v. *Maroney*, 399 U. S. 42, the officers lawfully could search the automobile—including its trunk—without a warrant. The court considered separately, however, the warrantless search of the two containers found in the trunk. On the basis of *Arkansas* v. *Sanders*, 442 U. S. 753, the court concluded that the constitutionality of a warrantless search of a container found in an automobile depends on whether the owner possesses a reasonable expectation of privacy in its contents. Applying that test, the court held that the warrantless search of the paper bag was valid but the search of the leather pouch was not. The court remanded for a new trial at which the items taken from the paper bag, but not those from the leather pouch, could be admitted.[2]

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[1] "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., Amdt. 4.

[2] The court rejected the Government's argument that the warrantless search of the leather pouch was justified as incident to respondent's arrest. App. to Pet. for Cert. 137a. The Government has not challenged this holding.

The entire Court of Appeals then voted to rehear the case en banc. A majority of the court rejected the panel's conclusion that a distinction of constitutional significance existed between the two containers found in respondent's trunk; it held that the police should not have opened either container without first obtaining a warrant. The court reasoned:

> "No specific, well-delineated exception called to our attention permits the police to dispense with a warrant to open and search 'unworthy' containers. Moreover, we believe that a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts. For these reasons, and because the Fourth Amendment protects all persons, not just those with the resources or fastidiousness to place their effects in containers that decision-makers would rank in the luggage line, we hold that the Fourth Amendment warrant requirement forbids the warrantless opening of a closed, opaque paper bag to the same extent that it forbids the warrantless opening of a small unlocked suitcase or a zippered leather pouch." 655 F. 2d 1159, 1161 (CADC 1981) (footnote omitted).

The en banc Court of Appeals considered, and rejected, the argument that it was reasonable for the police to open both the paper bag and the leather pouch because they were entitled to conduct a warrantless search of the entire vehicle in which the two containers were found. The majority concluded that this argument was foreclosed by *Sanders*.

Three dissenting judges interpreted *Sanders* differently.[1] Other courts also have read the *Sanders* opinion in different ways.[2] Moreover, disagreement concerning the proper interpretation of *Sanders* was at least partially responsible for the fact that *Robbins* v. *California*, —— U. S. ——, was decided last Term without a Court opinion.

There is, however, no dispute among judges about the importance of striving for clarification in this area of the law. For countless vehicles are stopped on highways and public streets every day and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle. In every such case a conflict is presented between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement. No single rule of law can resolve every conflict, but our conviction that clarification is feasible led us to grant the Government's petition for certiorari in this case and to invite the parties to address the question whether the decision in *Robbins* should be reconsidered. —— U. S. ——.

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[1] Judge Tamm, the author of the original panel opinion, reiterated the view that *Sanders* prohibited the warrantless search of the leather pouch but not the search of the paper bag. Judge Robb agreed that this result was compelled by *Sanders*, although he stated that in his opinion "the right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room." 655 F. 2d, at 1180. Judge MacKinnon concurred with Judge Tamm that *Sanders* did not prohibit the warrantless search of the paper bag. Concerning the leather pouch, he agreed with Judge Wilkey, who dissented on the ground that *Sanders* should not be applied retroactively.

[2] Many courts have held that *Sanders* requires that a warrant be obtained only for personal luggage and other "luggage-type" containers. See, *e. g.*, *United States* v. *Brown*, 635 F. 2d 1207 (CA6 1980); *United States* v. *Jimenez*, 626 F. 2d 39 (CA7 1980). One court has held that *Sanders* does not apply if the police have probable cause to search an entire vehicle and not merely an isolated container within it. Cf. *State* v. *Bible*, 389 So. 2d 42 (La. 1980), *remanded*, 453 U. S. 918; *State* v. *Hernandez*, 408 So. 2d 911 (La. 1981); see also *United States* v. *Ross*, 655 F. 2d, at 1180 (Robb, J., dissenting).

II

We begin with a review of the decision in *Carroll* itself. In the fall of 1921, federal prohibition agents obtained evidence that George Carroll and John Kiro were "bootleggers" who frequently traveled between Grand Rapids and Detroit in an Oldsmobile Roadster.[3] On December 15, 1921, the agents unexpectedly encountered Carroll and Kiro driving west on that route in that car. The officers gave pursuit, stopped the roadster on the highway, and directed Carroll and Kiro to get out of the car.

No contraband was visible in the front seat of the Oldsmobile and the rear portion of the roadster was closed. One of the agents raised the rumble seat but found no liquor. He raised the seat cushion and again found nothing. The officer then struck at the "lazyback" of the seat and noticed that it was "harder than upholstery ordinarily is in those backs." 267 U. S., at 174. He tore open the seat cushion and discovered 68 bottles of gin and whiskey concealed inside. No warrant had been obtained for the search.

Carroll and Kiro were convicted of transporting intoxicating liquor in violation of the National Prohibition Act. On review of those convictions, this Court ruled that the warrantless search of the roadster was reasonable within the meaning of the Fourth Amendment. In an extensive opinion written by Chief Justice Taft, the Court held:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Id.*, at 149.

The Court explained at length the basis for this rule. The Court noted that historically warrantless searches of vessels, wagons, and carriages—as opposed to fixed premises such as a home or other building—had been considered reasonable by Congress. After reviewing legislation enacted by Congress between 1789 and 1799,[4] the Court stated:

> "Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.*, at 151.

The Court reviewed additional legislation passed by Congress[5] and again noted that

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[3] On September 29, 1921, Carroll and Kiro met the agents in Grand Rapids and agreed to sell them three cases of whiskey. The sale was not consummated, however, possibly because Carroll learned the agents' true identity. In October, the agents discovered Carroll and Kiro driving the Oldsmobile Roadster on the road to Detroit, which was known as an active center for the introduction of illegal liquor into this country. The agents followed the roadster as far as East Lansing, but there abandoned the chase.

[4] The legislation authorized customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it concealed goods subject to duty. The same legislation required a warrant for searches of dwelling places. 267 U. S., at 150–151.

[5] In particular, the Court noted an 1815 statute that permitted customs officers not only to board and search vessels without a warrant "but also to

> "the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153.

Thus, since its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods.[7] It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable.[8]

In defining the nature of this "exception" to the general rule that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used," *id.*, at 156, the Court in *Carroll* emphasized the importance of the requirement that officers have probable cause to believe that the vehicle contains contraband.

> "Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 153–154.

Moreover, the probable cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. "'[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgment of the court would make his faith reasonable.'" *Id.*, at 161–162 (quoting *Director General* v. *Kastenbaum*, 263 U. S. 25, 28).[10]

In short, the exception to the warrant requirement established in *Carroll*—the scope of which we consider in this case—applies only to searches of vehicles that are supported by probable cause.[11] In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.[12]

III

The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance. That argument, however, was squarely rejected in *United States* v. *Chadwick*, 433 U. S. 1.

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stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law." *Id.*, at 151.

[7] In light of this established history, individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.

[8] Subsequent cases make clear that the decision in *Carroll* was not based on the fact that the only course available to the police was an immediate search. As Justice Harlan later recognized, although a failure to *seize* a moving automobile believed to contain contraband might deprive officers of the illicit goods, once a vehicle itself has been stopped the exigency does not necessarily justify a warrantless *search*. *Chambers* v. *Maroney*, 399 U. S. 42, 62–64 (opinion of Harlan, J.). The Court in *Chambers*, however—with only Justice Harlan dissenting—refused to adopt a rule that would permit a warrantless seizure but prohibit a warrantless search. The Court held that if police officers have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct an immediate search of the contents of that vehicle. "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers* v. *Maroney*, 399 U. S., at 52.

The Court also has held that if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded. *Chambers*, *supra*; *Texas* v. *White*, 423 U. S. 67. These decisions are based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests. Given the scope of the initial intrusion caused by a seizure of an automobile—which often could leave the occupants stranded on the highway—the Court rejected an inflexible rule that would force police officers in every case either to post guard at the vehicle while a warrant is obtained or to tow the vehicle itself to the station. Similarly, if an immediate search on the scene could be conducted, but not one at the station if the vehicle is impounded, police often simply would search the vehicle on the street—at no advantage to the occupants, yet possibly at certain cost to the police. The rules as applied in particular cases may appear unsatisfactory. They reflect, however, a reasoned application of the more general rule that if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference.

[10] After reviewing the relevant authorities at some length, the Court concluded that the probable cause requirement was satisfied in the case before it. The Court held that "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Id.*, at 162. Cf. *Brinegar* v. *United States*, 338 U. S. 160, 176–177; *Henry* v. *United States*, 361 U. S. 98, 102.

[11] See *Husky* v. *United States*, 282 U. S. 694; *Scher* v. *United States*, 305 U. S. 251; *Brinegar* v. *United States*, 338 U. S. 160; *Henry* v. *United States*, 361 U. S. 98; *Dyke* v. *Taylor Implement Co.*, 391 U. S. 216; *Chambers* v. *Maroney*, 399 U. S. 42; *Texas* v. *White*, 423 U. S. 67; *Colorado* v. *Bannister*, 449 U. S. 1.

Warrantless searches of automobiles have been upheld in a variety of factual contexts quite different from that presented in *Carroll*. Cf. *Cooper* v. *California*, 386 U. S. 58; *Cady* v. *Dombrowski*, 413 U. S. 433; *South Dakota* v. *Opperman*, 428 U. S. 364. Many of these searches do not require a showing of probable cause that the vehicle contains contraband. We are not called upon—and do not—consider in this case the scope of the warrantless search that is permitted in those cases.

[12] As the Court in *Carroll* concluded:

"We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the *Weeks* and *Amos* cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them." 267 U. S., at 156.

Chadwick involved the warrantless search of a 200-pound footlocker secured with two padlocks. Federal railroad officials in San Diego became suspicious when they noticed that a brown footlocker loaded onto a train bound for Boston was unusually heavy and leaking talcum powder, a substance often used to mask the odor of marijuana. Narcotics agents met the train in Boston and a trained police dog signaled the presence of a controlled substance inside the footlocker. The agents did not seize the footlocker, however, at this time; they waited until respondent Chadwick arrived and the footlocker was placed in the trunk of Chadwick's automobile. Before the engine was started, the officers arrested Chadwick and his two companions. The agents then removed the footlocker to a secured place, opened it without a warrant, and discovered a large quantity of marijuana.

In a subsequent criminal proceeding, Chadwick claimed that the warrantless search of the footlocker violated the Fourth Amendment. In the District Court, the Government argued that as soon as the footlocker was placed in the automobile a warrantless search was permissible under *Carroll*. The District Court rejected that argument,[10] and the Government did not pursue it on appeal.[11] Rather, the Government contended in this Court that the warrant requirement of the Fourth Amendment applied only to searches of homes and other "core" areas of privacy. The Court unanimously rejected that contention.[12] Writing for the Court, THE CHIEF JUSTICE stated:

> "[I]f there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America. Thus, silence in the historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search of respondents' footlocker. What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." 433 U. S., at 8–9 (footnote omitted).

The Court in *Chadwick* specifically rejected the argument that the warrantless search was "reasonable" because a footlocker has some of the mobile characteristics that support warrantless searches of automobiles. The Court recognized that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile," *id.*, at 13, and noted that the practical problems associated with the temporary detention of a piece of luggage during the period of time necessary to obtain a warrant are significantly less than those associated with the detention of an automobile. *Id.*, at 13, n. 7. In ruling that the warrantless search of the footlocker was unjustified, the Court reaffirmed the general principle that closed packages and containers may not be searched without a warrant. Cf. *Ex parte Jackson*, 96 U. S. 727; *United States* v. *Leeuwen*, 397 U. S. 249. In sum, the Court in *Chadwick* declined to extend the rationale of the "automobile exception" to permit a warrantless search of any movable container found in a public place.[13]

The facts in *Arkansas* v. *Sanders*, 442 U. S. 753, were similar to those in *Chadwick*. In *Sanders*, a Little Rock police officer received information from a reliable informant that Sanders would arrive at the local airport on a specified flight that afternoon carrying a green suitcase containing marijuana. The officer went to the airport. Sanders arrived on schedule and retrieved a green suitcase from the airline baggage service. Sanders gave the suitcase to a waiting companion who placed it in the trunk of a taxi. Sanders and his companion drove off in the cab; police officers followed and stopped the taxi several blocks from the airport. The officers opened the trunk, seized the suitcase, and searched it on the scene without a warrant. As predicted, the suitcase contained marijuana.

The Arkansas Supreme Court ruled that the warrantless search of the suitcase was impermissible under the Fourth Amendment, and this Court affirmed. As in *Chadwick*, the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of *Carroll* applicable; the police had probable cause to seize the suitcase before it was placed in the trunk of the cab and did not have probable cause to search the taxi itself.[14] Since the suitcase had been placed in the trunk, no danger existed that its contents could have been secreted elsewhere in the vehicle.[15] As THE CHIEF JUSTICE noted in his opinion concurring in the judgment:

> "Because the police officers had probable cause to believe that respondent's green suitcase contained marijuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States* v. *Chadwick*, 433 U. S. 1 (1977).
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> . . . . .
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> Here, as in *Chadwick*, it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick*. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automo-

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[10] The District Court noted:

"In this case, there was no nexus between the search and the automobile, merely a coincidence. The challenged search in this case was one of a footlocker, not an automobile. The search took place not in an automobile, but in [the federal building]. The only connection that the automobile had to this search was that, prior to its seizure, the footlocker was placed on the floor of an automobile's open trunk." *United States* v. *Chadwick*, 393 F. Supp. 763, 772 (Mass. 1975).

[11] This Court specifically noted: "The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search, but it is argued that the rationale of our automobile search cases demonstrates the reasonableness of permitting warrantless searches of luggage; the Government views such luggage as analagous to motor vehicles for Fourth Amendment purposes." 433 U. S., at 11–12.

[12] See *id.*, at 17 (BLACKMUN, J., dissenting).

[13] The Court concluded that there is a significant difference between the seizure of a sealed package and a subsequent search of its contents; the search of the container in that case was "a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker." *Id.*, at 13, n. 8. A temporary seizure of a package or piece of luggage often may be accomplished without as significant an intrusion upon the individual—and without as great a burden on the police—as in the case of the seizure of an automobile. See n. 9, *supra*.

[14] The Arkansas Supreme Court carefully reviewed the facts of the case and concluded: "The information supplied to the police by the confidential informant is adequate to support the State's claim that the police had probable cause to believe that appellant's green suitcase contained a controlled substance when the police confiscated the suitcase and opened it." 262 Ark. 595, 599, 559 S.W. 2d 704, 706 (1977). The court also noted: "The evidence in this case supports the conclusion that the relationship between the suitcase and the taxicab is coincidental." *Id.*, at 600, n. 2, 559 S.W. 2d, at 706.

[15] Moreover, none of the practical difficulties associated with the detention of a vehicle on a public highway that made the immediate search in *Carroll* reasonable could justify an immediate search of the suitcase, since the officers had no interest in detaining the taxi or its driver.

bile' exception case. The Court need say no more." *Id.*, at 766–767.

The Court in *Sanders* did not, however, rest its decision solely on the authority of *Chadwick*. In rejecting the State's argument that the warrantless search of the suitcase was justified on the ground that it had been taken from an automobile lawfully stopped on the street, the Court broadly suggested that a warrantless search of a container found in an automobile could never be sustained as part of a warrantless search of the automobile itself.[6] The Court did not suggest that it mattered whether probable cause existed to search the entire vehicle. It is clear, however, that in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter.

Robbins v. *California*, 453 U. S. 420, however, was a case in which suspicion was not directed at a specific container. In that case the Court for the first time was forced to consider whether police officers who are entitled to conduct a warrantless search of an automobile stopped on a public roadway may open a container found within the vehicle. In the early morning of January 5, 1975, police officers stopped Robbins' station wagon because he was driving erratically. Robbins got out of the car, but later returned to obtain the vehicle's registration papers. When he opened the car door, the officers smelled marijuana smoke. One of the officers searched Robbins and discovered a vial of liquid; in a search of the interior of the car the officer found marijuana. The police officers then opened the tailgate of the station wagon and raised the cover of a recessed luggage compartment. In the compartment they found two packages wrapped in green opaque plastic. The police unwrapped the packages and discovered a large amount of marijuana in each.

Robbins was charged with various drug offenses and moved to suppress the contents of the plastic packages. The California Court of Appeal held that "[s]earch of the automobile was proper when the officers learned that appellant was smoking marijuana when they stopped him"[7] and that the warrantless search of the packages was justified because "the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents." 103 Cal. App. 3d 34, 40, 162 Cal. Rptr. 780, 783 (1980).

This Court reversed. Writing for a plurality, Justice Stewart rejected the argument that the outward appearance of the packages precluded Robbins from having a reasonable expectation of privacy in their contents. He also squarely rejected the argument that there is a constitutional distinction between searches of luggage and searches of "less worthy" containers. Justice Stewart reasoned that all containers are equally protected by the Fourth Amendment unless their contents are in plain view. The plurality concluded that the warrantless search was impermissible because *Chadwick* and *Sanders* had established that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." 453 U. S., at 425.

In a concurring opinion, JUSTICE POWELL, the author of the Court's opinion in *Sanders*, stated that "[t]he plurality's approach strains the rationales of our prior cases and imposes substantial burdens on law enforcement without vindicating any significant values of privacy." *Id.*, at 429.[8] He noted that possibly "the controlling question should be the scope of the automobile exception to the warrant requirement," *id.*, at 435, and explained that under that view

> "when the police have probable cause to search an automobile, rather than only to search a particular container that fortuitously is located in it, the exigencies that allow the police to search the entire automobile without a warrant support the warrantless search of every container found therein. See *post*, at 451 and n. 13 (STEVENS, J., dissenting). This analysis is entirely consistent with the holdings in *Chadwick* and *Sanders*, neither of which is an 'automobile case,' because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile." *Ibid.*

The parties in *Robbins* had not pressed that argument, however, and JUSTICE POWELL concluded that institutional constraints made it inappropriate to re-examine basic doctrine without full adversary presentation. He concurred in the judgment, since it was supported—although not compelled—by the Court's opinion in *Sanders*, and stated that a future case might present a better opportunity for thorough consideration of the basic principles in this troubled area.

That case has arrived. Unlike *Chadwick* and *Sanders*, in this case police officers had probable cause to search respondent's entire vehicle.[9] Unlike *Robbins*, in this case the parties have squarely addressed the question whether, in the course of a legitimate warrantless search of an automobile, police are entitled to open containers found within the vehicle. We now address that question. Its answer is deter-

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[6] The Court stated that "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." 442 U. S., at 764, n. 13. This general rule was limited only by the observation that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." *Ibid.*

[7] 103 Cal. App. 3d 34, 39, 162 Cal. Rptr. 780, 782 (1980).

[8] "While the plurality's blanket warrant requirement does not even purport to protect any privacy interest, it would impose substantial new burdens on law enforcement. Confronted with a cigar box or a Dixie cup in the course of a probable cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain a warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values." 453 U. S., at 433–434 (POWELL, J., concurring).

The substantial burdens on law enforcement identified by JUSTICE POWELL would, of course, not be affected by the character of the container found during an automobile search. No comparable practical problems arise when the official suspicion is confined to a particular piece of luggage, as in *Chadwick* and *Sanders*. Cf. n. 19, *supra*.

[9] The en banc Court of Appeals stated that "[b]ased on the tip the police received, Ross's car was properly stopped and searched, and the pouch and bag were properly seized." 655 F. 2d, at 1168 (footnote omitted). The court explained:

"[W]e believe it clear that the police had ample and reasonable cause to stop Ross and to search his car. The informer had supplied accurate information on prior occasions, and he was an eyewitness to sales of narcotics by Ross. He said he had just seen Ross take narcotics from the trunk of his car in making a sale and heard him say he possessed additional narcotics." *Id.*, at 1168, n. 22.

The court further noted that "[i]n this case, the informant told the police that Ross had narcotics in the trunk of his car. No specific container was identified." *Id.*, at 1166.

mined by the scope of the search that is authorized by the exception to the warrant requirement set forth in *Carroll*.

IV

In *Carroll* itself, the whiskey that the prohibition agents seized was not in plain view. It was discovered only after an officer opened the rumble seat and tore open the upholstery of the lazyback. The Court did not find the scope of the search unreasonable. Having stopped Carroll and Kiro on a public road and subjected them to the indignity of a vehicle search—which the Court found to be a reasonable intrusion on their privacy because it was based on probable cause that their vehicle was transporting contraband—prohibition agents were entitled to tear open a portion of the roadster itself. The scope of the search was no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search. Since such a warrant could have authorized the agents to open the rear portion of the roadster and to rip the upholstery in their search for concealed whiskey, the search was constitutionally permissible.

In *Chambers* v. *Maroney* the police found weapons and stolen property "concealed in a compartment under the dashboard." 399 U. S., at 44. No suggestion was made that the scope of the search was impermissible. It would be illogical to assume that the outcome of *Chambers*—or the outcome of *Carroll* itself—would have been different if the police had found the secreted contraband enclosed within a secondary container and had opened that container without a warrant. If it was reasonable for prohibition agents to rip open the upholstery in *Carroll*, it certainly would have been reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it. A contrary rule could produce absurd results inconsistent with the decision in *Carroll* itself.

In its application of *Carroll*, this Court in fact has sustained warrantless searches of containers found during a lawful search of an automobile. In *Husty* v. *United States*, 282 U. S. 694, the Court upheld a warrantless seizure of whiskey found during a search of an automobile, some of which was discovered in "whiskey bags" that could have contained other goods.[9] In *Scher* v. *United States*, 305 U. S. 251, federal officers seized and searched packages of unstamped liquor found in the trunk of an automobile searched without a warrant. As described by a police officer who participated in the search: "I turned the handle and opened the trunk and found the trunk completely filled with packages wrapped in brown paper, and tied with twine; I think somewhere around thirty packages, each one containing six bottles."[10] In these cases it was not contended that police officers needed a warrant to open the whiskey bags or to unwrap the brown paper packages. These decisions nevertheless "have much weight, as they show that this point neither occurred to the bar or the bench." *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 88 (Marshall, C. J.). The fact that no such argument was even made illuminates the profession's understanding of the scope of the search permitted under *Carroll*. Indeed, prior to the decisions in *Chadwick* and *Sanders*, courts routinely had held that containers and packages found during a legitimate warrantless search of an automobile also could be searched without a warrant.[11]

As we have stated, the decision in *Carroll* was based on the Court's appraisal of practical considerations viewed in the perspective of history. It is therefore significant that the practical consequences of the *Carroll* decision would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle. Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container.[12] The Court in *Carroll* held that "contraband goods *concealed* and illegally transported in an automobile or other vehicle may be searched for without a warrant." 267 U. S., at 153 (emphasis added). As we noted in *Henry* v. *United States*, 361 U. S. 98, 104, the decision in *Carroll* "merely relaxed the requirements for a warrant on grounds of impracticability." It neither broadened nor limited the scope of a lawful search based on probable cause.

A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.[13] Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined,

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[9] At the suppression hearing, defense counsel asked the police officer who had conducted the search: "Isn't it possible to put other goods in a bag that has the resemblance of a whiskey bag?" The officer responded: "I suppose it is. I did not think of that at that time. I knew it was whiskey, I was sure it was." App., O.T. 1930, No. 477, p. 27.

[10] App., O.T. 1938, No. 49, p. 33. The brief of then Solicitor General Robert Jackson noted that the items searched "were wrapped in very heavy brown wrapping paper with at least two wrappings and with a heavy cord around them cross-wise so that they could readily be lifted." Brief for United States, O.T. 1938, No. 49, p. 6.

[11] See, *e. g.*, *United States* v. *Soriano*, 497 F. 2d 147, 149–150 (CA5 1974) (en banc); *United States* v. *Venta*, 533 F. 2d 838, 867, n. 101 (CA3 1976); *United States* v. *Tramunti*, 513 F. 2d 1087, 1104 (CA2 1975); *United States* v. *Isaad*, 508 F. 2d 990, 993 (CA7 1974); *United States* v. *Evans*, 481 F. 2d 990, 991 (CA9 1973); *United States* v. *Bowman*, 487 F. 2d 1229 (CA10 1973). Many courts continued to apply this rule following the decision in *Chadwick*. Cf. *United States* v. *Milhollan*, 599 F. 2d 516, 526–527 (CA3 1979); *United States* v. *Gaultney*, 581 F. 2d 1137, 1144–1145 (CA5 1978); *United States* v. *Finnegan*, 568 F. 2d 637, 640–641 (CA9 1977). In ruling that police could search luggage and other containers found during a legitimate warrantless search of an automobile, courts often assumed that the "automobile exception" of *Carroll* applied whenever a container in an automobile was believed to contain contraband. That view, of course, has since been qualified by *Chadwick* and *Sanders*.

[12] It is noteworthy that the early legislation on which the Court relied in *Carroll* concerned the enforcement of laws imposing duties on imported merchandise. See nn. 6 and 7, *supra*. Presumably such merchandise was shipped then in containers of various kinds, just as it is today. Since Congress had authorized warrantless searches of vessels and beasts for imported merchandise, it is inconceivable that it intended a customs officer to obtain a warrant for every package discovered during the search; certainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed. During virtually the entire history of our country—whether contraband was transported in a horse drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.

[13] In describing the permissible scope of a search of a home pursuant to a warrant, Professor LaFave notes:

"Places within the described premises are not excluded merely because some additional act of entry or opening may be required. 'In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and similar items has been permitted.'" 2 LaFave, Search and Seizure 152 (1978) (quoting *Massey* v. *Commonwealth*, 305 S.W. 2d 755, 756 (Ky. 1957)).

nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.[7]

This rule applies equally to all containers, as indeed we believe it must. One point on which the Court was in virtually unanimous agreement in *Robbins* was that a constitutional distinction between "worthy" and "unworthy" containers would be improper.[8] Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other,[9] the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion,[10] so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

As Justice Stewart stated in *Robbins*, the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view. 453 U. S., at 427 (plurality opinion). But the protection afforded by the Amendment varies in different settings. The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be. A container carried at the time of arrest often may be searched without a warrant and even without any specific suspicion concerning its contents. A container that may conceal the object of a search authorized by a warrant may be opened immediately; the individual's interest in privacy must give way to the magistrate's official determination of probable cause.

In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container. An individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened. These interests must yield to the authority of a search, however, which—in light of *Carroll*—does not itself require the prior approval of a magistrate. The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.[11]

The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

V

Our decision today is inconsistent with the disposition in *Robbins* v. *California* and with the portion of the opinion in *Arkansas* v. *Sanders* on which the plurality in *Robbins* relied. Nevertheless, the doctrine of *stare decisis* does not preclude this action. Although we have rejected some of the reasoning in *Sanders*, we adhere to our holding in that case; although we reject the precise holding in *Robbins*, there was no Court opinion supporting a single rationale for its judgment and the reasoning we adopt today was not presented by the parties in that case. Moreover, it is clear that no legitimate reliance interest can be frustrated by our decision today.[12] Of greatest importance, we are convinced that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history.

We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey* v. *Arizona*, 437 U. S. 385, 390:

> "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' *Katz* v. *United States*, 389 U. S. 347, 357 (footnotes omitted)."

The exception recognized in *Carroll* is unquestionably one that is "specifically established and well-delineated." We hold that the scope of the warrantless search authorized by

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[7] The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed. Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle; thus in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained. Such a requirement would be directly inconsistent with the rationale supporting the decisions in *Carroll* and *Chambers*. Cf. nn. 19 and 22, *supra*.

[8] Cf. 453 U. S., at 426–427 (plurality opinion); *id.*, at 436 (BLACKMUN, J., dissenting); *id.*, at 443 (REHNQUIST, J., dissenting); *id.*, at 447 (STEVENS, J., dissenting).

[9] If the distinction is based on the proposition that the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy, however, the propriety of a warrantless search necessarily would turn on much more than the fabric of the container. A paper bag stapled shut and marked "private" might be found to manifest a reasonable expectation of privacy, as could a cardboard box stacked on top of two pieces of heavy luggage. The propriety of the warrantless search seemingly would turn on an objective appraisal of all the surrounding circumstances.

[10] "'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his forces dares not cross the threshold of the ruined tenement!'" *Miller* v. *United States*, 357 U. S. 301, 307 (quoting remarks attributed to William Pitt); cf. *Payton* v. *New York*, 445 U. S. 573, 601 n. 54.

[11] In choosing to search without a warrant on their own assessment of probable cause, police officers of course lose the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the search was unconstitutional. Cf. *Monroe* v. *Pape*, 365 U. S. 167. Although an officer may establish that he acted in good faith in conducting the search by other evidence, a warrant issued by a magistrate normally suffices to establish it.

[12] Any interest in maintaining the status quo that might be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedents clearly would not be legitimate.

that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

The judgment of the Court of Appeals is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring.

My dissents in prior cases have indicated my continuing dissatisfaction and discomfort with the Court's vacillation in what is rightly described as "this troubled area." *Ante*, at 18. See *United States* v. *Chadwick*, 433 U. S. 1, 17 (1977); *Arkansas* v. *Sanders*, 442 U. S. 753, 768 (1979); *Robbins* v. *California*, 453 U. S. 420, 436 (1981).

I adhere to the views expressed in those dissents. It is important, however, not only for the Court as an institution, but also for law enforcement officials and defendants, that the applicable legal rules be clearly established. JUSTICE STEVENS' opinion for the Court now accomplishes much in this respect, and it should clarify a good bit of the confusion that has existed. In order to have an authoritative ruling, I join the Court's opinion and judgment.

JUSTICE POWELL, concurring.

In my opinion in *Robbins* v. *California*, 453 U. S. 420, 429 (1981), concurring in the judgment, I stated that the judgment was justified, though not compelled, by the Court's opinion in *Arkansas* v. *Sander*, 442 U. S. 753 (1979). I did not agree, however, with the "bright line" rule articulated by the plurality opinion. Rather, I repeated the view I long have held that one's "reasonable expectation of privacy" is a particularly relevant factor in determining the validity of a warrantless search. I have recognized, that with respect to automobiles in general, this expectation can be only a limited one. See *Arkansas* v. *Sanders*, *supra*, at 761; *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 279 (1973) (POWELL, J., concurring). I continue to think that in many situations one's reasonable expectation of privacy may be a decisive factor in a search case.

It became evident last Term, however, from the five opinions written in *Robbins*—in none of which THE CHIEF JUSTICE joined—that it is essential to have a Court opinion in *automobile* search cases that provides "specific guidance to police and courts in this reoccuring situation". *Robbins* v. *California*, 453 U. S. at, 435 (POWELL, J., concurring). The Court's opinion today, written by JUSTICE STEVENS and now joined by four other Justices, will afford this needed guidance. It is fair also to say that, given *Carroll* v. *United States*, 267 U. S. 132 (1925) and *Chambers* v. *Maroney*, 399 U. S. 42 (1970), the Court's decision does not depart substantially from Fourth Amendment doctrine in automobile cases. Moreover, in enunciating a readily understood and applied rule, today's decision is consistent with the similar step taken last Term in *Belton* v. *New York*, 453 U. S. 454 (1981).

I join the Court's opinion.

JUSTICE WHITE, dissenting:

I would not overrule *Robbins* v. *California*, 453 U. S. 420 (1981). For the reasons stated by Justice Stewart in that case, I would affirm the judgment of the Court of Appeals. I also agree with much of Justice Marshall's dissent in this case.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The majority today not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself. By equating a police officer's estimation of probable cause with a magistrate's, the Court utterly disregards the value of a neutral and detached magistrate. For as we recently, and unanimously, reaffirmed:

> "The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Shadwick* v. *City of Tampa*, 407 U. S. 345, 350 (1972), citing *Johnson* v. *United States*, 333 U. S. 10, 14 (1948).

A police officer on the beat hardly satisfies these standards. In adopting today's new rule, the majority opinion shows contempt for these Fourth Amendment values, ignores this Court's precedents, is internally inconsistent, and produces anomalous and unjust consequences. I therefore dissent.

I

According to the majority, whenever police have probable cause to believe that contraband may be found within an automobile that they have stopped on the highway,[1] they may search not only the automobile but also any container found inside it, without obtaining a warrant. The scope of the search, we are told, is as broad as a magistrate could authorize in a warrant to search the automobile. The majority makes little attempt to justify this rule in terms of recognized Fourth Amendment values. The Court simply ignores the critical function that a magistrate serves. And although the Court purports to rely on the mobility of an automobile and the impracticability of obtaining a warrant, it never explains why these concerns permit the warrantless search of a *container*, which can easily be seized and immobilized while police are obtaining a warrant.

The new rule adopted by the Court today is completely incompatible with established Fourth Amendment principles, and takes a first step toward an unprecedented "probable cause" exception to the warrant requirement. In my view, under accepted standards, the warrantless search of the container in this case clearly violates the Fourth Amendment.

A

"[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Mincey* v. *Arizona*, 437 U. S. 385 (1978), citing *Katz* v. *United States*, 389 U. S. 347, 357 (1967). The warrant requirement is crucial to protecting Fourth Amendment rights because of the importance of having the probable cause determination made in the first in-

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[1] The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars. Cf. *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971).

stance by a neutral and detached magistrate. Time and again, we have emphasized that the warrant requirement provides a number of protections that a post-hoc judicial evaluation of a policeman's probable cause does not.

The requirement of prior review by a detached and neutral magistrate limits the concentration of power held by executive officers over the individual, and prevents some overbroad or unjustified searches from occurring at all. See *United States* v. *United States District Court*, 407 U. S. 297, 317 (1972); *Abel* v. *United States*, 362 U. S. 217, 252 (1959) (JUSTICE BRENNAN, with whom Chief Justice Warren, Justice Black, and Justice Douglas join, dissenting). Prior review may also "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 565 (1976); see also *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964). Furthermore, even if a magistrate would have authorized the search that the police conducted, the interposition of a magistrate's neutral judgment reassures the public that the orderly process of law has been respected:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948).

See also *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 323 (1978); *United States* v. *United States District Court*, 407 U. S., at 321. The safeguards embodied in the warrant requirement apply as forcefully to automobile searches as to any others.

Our cases do recognize a narrow exception to the warrant requirement for certain automobile searches. Throughout our decisions, two major considerations have been advanced to justify the automobile exception to the warrant requirement. We have upheld only those searches that are actually justified by those considerations.

First, these searches have been justified on the basis of the exigency of the mobility of the automobile. See, *e. g.*, *Chambers* v. *Maroney*, 399 U. S. 42 (1970); *Carroll* v. *United States*, 267 U. S. 132 (1925). This "mobility" rationale is something of a misnomer, cf. *Cady* v. *Dombrowski*, 413 U. S. 433, 442–443 (1973), since the police ordinarily can remove the car's occupants and secure the vehicle on the spot. However, the inherent mobility of the vehicle often creates situations in which the police's only alternative to an immediate search may be to release the automobile from their possession.[1] This alternative creates an unacceptably high risk of losing the contents of the vehicle, and is a principal basis for the Court's automobile exception to the warrant requirement. See *Chambers*, 399 U. S., at 51, n. 9.

In many cases, however, the police will, prior to searching the car, have cause to arrest the occupants and bring them to the station for booking. In this situation, the police can ordinarily seize the automobile and bring it to the station. Because the vehicle is now in the exclusive control of the authorities, any subsequent search cannot be justified by the mobility of the car. Rather, an immediate warrantless search of the vehicle is permitted because of the second major justification for the automobile exception: the diminished expectation of privacy in an automobile.

Because an automobile presents much of its contents in open view to police officers who legitimately stop it on a public way, is used for travel, and is subject to significant government regulation, this Court has determined that the intrusion of a warrantless search of an automobile is constitutionally less significant than a warrantless search of more private areas. See *Arkansas* v. *Sanders*, 442 U. S. 753, 761 (1979) (collecting cases). This justification has been invoked for warrantless automobile searches in circumstances where the exigency of mobility was clearly not present. See, *e. g.*, *South Dakota* v. *Opperman*, 428 U. S. 364, 367–368 (1978); *Cady* v. *Dombrowski*, 413 U. S., at 441–442. By focusing on the defendant's reasonable expectation of privacy, this Court has refused to require a warrant in situations where the process of obtaining such a warrant would be more intrusive than the actual search itself. Cf. *Katz* v. *United States*, 389 U. S. 347 (1967). A defendant may consider the seizure of the car a greater intrusion than an immediate search. See *Chambers*, 399 U. S., at 51–52. Therefore, even where police *can* bring both the defendants and the automobile to the station safely and can house the car while they seek a warrant, the police are permitted to decide whether instead to conduct an immediate search of the car. In effect, the warrantless search is permissible because a warrant requirement would not provide significant protection of the defendant's Fourth Amendment interests.

B

The majority's rule is flatly inconsistent with these established Fourth Amendment principles concerning the scope of the automobile exception and the importance of the warrant requirement. Historically, the automobile exception has been limited to those situations where its application is compelled by the justifications described above. Today, the majority makes no attempt to base its decision on these justifications. This failure is not surprising, since the traditional rationales for the automobile exception plainly do not support extending it to the search of a container found inside a vehicle.

The practical mobility problem—deciding what to do with both the car and the occupants if an immediate search is not conducted—is simply not present in the case of movable containers, which can easily be seized and brought to the magistrate. See *Sanders*, 442 U. S., at 762–766 and nn. 10, 14. The lesser expectation of privacy rationale also has little force. A container, as opposed to the car itself, does not reflect diminished privacy interests. See *id.*, at 762, 764–765. Moreover, the practical corollary that this Court has recognized—that depriving occupants of the use of a car may be a greater intrusion than an immediate search—is of doubtful relevance here, since the owner of a container will rarely suffer significant inconvenience by being deprived of its use while a warrant is being obtained.

Ultimately, the majority, unable to rely on the justifications underlying the automobile exception, simply creates a new "probable cause" exception to the warrant requirement for automobiles. We have soundly rejected attempts to create such an exception in the past, see *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), and we should do so again today.

In purported reliance on *Carroll* v. *United States*, *supra*, the Court defines the permissible scope of a search by reference to the scope of a probable cause search that a magistrate could authorize. Under *Carroll*, however, the mobility of an automobile is what is critical to the legality of a warrantless search. Of course, *Carroll* properly confined the search to the probable cause limits that would also limit a magistrate,

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[1] The fact that the police are able initially to remove the occupants from the car does not remove the justification for an immediate search. If police could not conduct an immediate search of a stopped automobile, they would often be left with the difficult task of deciding what to do with the occupants while a warrant is obtained. In the case of a parked automobile, by contrast, if the automobile is unoccupied, this problem is not presented. See, *e. g.*, *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971).

but it did not suggest that the search could be as *broad* as a magistrate could authorize upon a warrant. A magistrate could authorize a search encompassing containers, even though the mobility rationale does not justify such a broad search. Indeed, the Court's reasoning might have justified the search of the entire car in *Coolidge* despite the fact that the car was not "mobile" at all. Thus, in blithely suggesting that *Carroll* "neither broadened nor limited the scope of a lawful search based on probable cause," *ante*, at 22, the majority assumes what has never been the law: that the scope of the automobile-mobility exception to the warrant requirement is as broad as the scope of a "lawful" probable cause search of an automobile, *i. e.*, one authorized by a magistrate.

The majority's sleight-of-hand ignores the obvious differences between the function served by a magistrate in making a determination of probable cause and the function of the automobile exception. It is irrelevant to a magistrate's function whether the items subject to search are mobile, may be in danger of destruction, or are impractical to store, or whether an immediate search would be less intrusive than a seizure without a warrant. A magistrate's only concern is whether there is probable cause to search them. Where suspicion has focused not on a particular item but only on a vehicle, home, or office, the magistrate might reasonably authorize a search of closed containers at the location as well. But an officer on the beat who searches an automobile without a warrant is not entitled to conduct a broader search than the exigency obviating the warrant justifies. After all, what justifies the warrantless search is not probable cause alone, but *probable cause coupled with the mobility of the automobile.* Because the scope of a *warrantless* search should depend on the scope of the justification for dispensing with a warrant, the entire premise of the majority's opinion fails to support its conclusion.

The majority's rule masks the startling assumption that a policeman's determination of probable cause is the functional equivalent of the determination of a neutral and detached magistrate. This assumption ignores a major premise of the warrant requirement—the importance of having a a neutral and detached magistrate determine whether probable cause exists. See ——— ——, *supra*. The majority's explanation that the scope of the warrantless automobile search will be "limited" to what a magistrate could authorize is thus inconsistent with our cases, which firmly establish that an on-the-spot determination of probable cause is *never* the same as a decision by a neutral and detached magistrate.

C

Our recent decisions in *United States* v. *Chadwick*, 433 U. S. 1 (1977), *Arkansas* v. *Sanders*, *supra*, and *Robbins* v. *California*, 453 U. S. 420 (1981), clearly affirm that movable containers are different from automobiles for Fourth Amendment purposes. In *Chadwick*, the Court drew a constitutional distinction between luggage and automobiles in terms of substantial differences in expectations of privacy. 433 U. S., at 12. Moreover, the Court held that the mobility of such containers does not justify dispensing with a warrant, since federal agents had seized the luggage and safely transferred it to their custody under their exclusive control. *Sanders* explicitly held that "the warrant requirement applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U. S., at 766. And *Robbins* reaffirmed the *Sanders* rationale as applied to wrapped packages found in the unlocked luggage compartment of a vehicle. 453 U. S., at 425.[1]

In light of these considerations, I conclude that any movable container found within an automobile deserves precisely the same degree of Fourth Amendment warrant protection that it would deserve if found at a location outside the automobile. See *Sanders*, 442 U. S., at 763–765 and n. 13; *Chadwick*, 433 U. S., at 17, n. 1 (JUSTICE BRENNAN, concurring). *Chadwick*, as the majority notes, "reaffirmed the general principle that closed packages and containers may not be searched without a warrant." *Ante*, at 13. Although there is no need to describe the exact contours of that protection in this dissenting opinion, it is clear enough that closed, opaque containers—regardless of whether they are "worthy" or are always used to store personal items—are ordinarily fully protected. Cf. *Sanders*, 442 U. S., at 764, n. 13.[2]

Here, because appellant Ross had placed the evidence in question in a closed paper bag, the container could be seized, but not searched, without a warrant. No practical exigencies required the warrantless searches on the street or at the station: Ross had been arrested and was in custody when both searches occurred, and the police succeeded in transporting the bag to the station without inadvertently spilling its contents.[3]

II

In announcing its new rule, the Court purports to rely on earlier automobile search cases, especially *Carroll* v. *United States*, *supra*. The Court's approach, however, far from being "faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history," *ante*, at 26, is plainly contrary to the letter and the spirit of our prior automobile search cases. Moreover, the new rule produces anomalous and unacceptable consequences.

A

The majority's argument that its decision is supported by our decisions in *Carroll* and *Chambers* is misplaced. The Court in *Carroll* upheld a warrantless search of an automobile for contraband on the basis of the impracticability of securing a warrant in cases involving the transportation of contraband goods. The Court did not, however, suggest that obtaining a warrant for the search of an automobile is always impracticable.[4] "In cases where the securing of a warrant is

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[1] The plurality stated: "[*Chadwick* and *Sanders*] made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else," *Robbins* v. *California*, 453 U. S. 420, 425 (1981) (plurality opinion).

[2] This rule may present some line-drawing problems, but no greater than those presented when a movable container is in the arms of a citizen walking down the street. There is no justification for relying on marginal difficulties of definition to reject a warrant requirement in one situation but not the other.

The Government argues that less secure containers such as paper bags can easily spill their contents, thus, no privacy interest of the defendant is protected if police are required to seize the container and bring it to the station. Whatever the force of this argument in other contexts, here police succeeded in reclosing the bag after the initial search and transporting it to the station without incident.

[3] The Court in *Carroll* v. *United States*, 267 U. S. 132 (1925), seems to have assumed that the police could not arrest the occupants of the automobile, since the offense was a misdemeanor and was not deemed to have been committed in the officers' presence. See 2 W. LaFave, Search & Seizure 511 (1978). Accordingly, police were faced with an exigency often not encountered today in searches of stopped automobiles: in order to *seize* the car pending the securing of a warrant, they would have to leave the occupants stranded.

reasonably practicable, *it must be used*. . . . In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." *Id.*, at 156 (emphasis added).[5] As this Court reaffirmed in *Chambers*, 399 U. S., at 50, "[n]either *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."

Notwithstanding the reasoning of these cases, the majority argues that *Carroll* and *Chambers* support its decisions because integral compartments of a car are functionally equivalent to containers found within a car, and because the practical advantages to the police of the *Carroll* doctrine "would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle." *Ante*, at 21–22. Neither of these arguments is persuasive. First, the Court's argument that allowing warrantless searches of certain integral compartments of the car in *Carroll* and *Chambers*, while protecting movable containers within the car, would be "illogical" and "absurd," *ante*, at 20, ignores the reason why this Court has allowed warrantless searches of automobile compartments. Surely an integral compartment within a car is just as mobile, and presents the same practical problems of safekeeping, as the car itself This cannot be said of movable containers located within the car. The fact that there may be a high expectation of privacy in both containers and compartments is irrelevant, since the privacy rationale is not, and cannot be, the justification for the warrantless search of compartments.

The Court's second argument, which focuses on the practical advantages to police of the *Carroll* doctrine, fares no better. The practical considerations which concerned the *Carroll* Court involved the difficulty of immobilizing a vehicle while a warrant must be obtained. The Court had no occasion to address whether *containers* present the same practical difficulties as the car itself or integral compartments of the car. They do not. See *supra*, at ——. *Carroll* hardly suggested, as the Court implies, *ante*, at 22, that a warrantless search is justified simply because it assists police in obtaining more evidence.

Although it can find no support for its rule in this Court's precedents or in the traditional justifications for the automobile exception, the majority offers another justification. In a footnote, the majority suggests that "practical considerations" militate against securing containers found during an automobile search and taking them to the magistrate. *Ante*, at 23, n. 28. The Court confidently remarks: "Certainly no privacy interest is served . . . by prohibiting police from opening immediately a container in which the object of the search may most likely be found and instead forcing them first to comb the entire vehicle. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle." *Id.* The vehicle would have to be seized while a warrant was obtained, a requirement inconsistent with *Carroll* and *Chambers*. *Id.*

This explanation is unpersuasive. As this Court explained in *Sanders* and as the majority today implicitly concedes, the burden to police departments of seizing a package or personal luggage simply does not compare to the burden of seizing and safeguarding automobiles. *Sanders*, 442 U. S., at 765, n. 14; *ante*, at 13 and 14, n. 16. Other aspects of the Court's explanation are also implausible. The search will not always require a "combing" of the entire vehicle, since police may be looking for a particular item and may discover it promptly. If, instead, they are looking more generally for evidence of a crime, the immediate opening of the container will not protect the defendant's privacy; whether or not it contains contraband, the police will continue to search for new evidence. Finally, the defendant, not the police, should be afforded the choice whether he prefers the immediate opening of his suitcase or other container to the delay incident to seeking a warrant. Cf. *Sanders*, 442 U. S., at 764, n. 12. The more reasonable presumption, if a presumption is to replace the defendant's consent, is surely that the immediate search of a closed container will be a greater invasion of the defendant's privacy interests than a mere temporary seizure of the container.[6]

B

Finally, the majority's new rule is theoretically unsound and will create anomalous and unwarranted results. These consequences are readily apparent from the Court's attempt to reconcile its new rule with the holdings of *Chadwick* and *Sanders*.[7] The Court suggests that probable cause to search only a container does not justify a warrantless search of an automobile in which it is placed, absent reason to believe that the contents could be secreted elsewhere in the vehicle. This, the majority asserts, is an indication that the new rule is carefully limited to its justification, and is not inconsistent with *Chadwick* and *Sanders*. But why is such a container more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the warrant requirement, than a container that police discover in a probable cause search of an entire automobile?[8] This rule

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[5] In *Carroll*, of course, no movable *container* was searched. Although in other early cases containers may in fact have been searched, see *ante*, at 20–21, the parties did not litigate in this Court the question whether containers deserve separate protection.

The Court's suggestion that the absence of such an argument "illuminates the profession's understanding of the scope of the search permitted under *Carroll*," *ante*, at 21, is an unusual approach to constitutional interpretation. I would hesitate to rely upon the "profession's understanding" of the Fourteenth Amendment or of *Plessy v. Ferguson*, 163 U. S. 537 (1896), in the early part of this Century as justification for not granting Negroes constitutional protection. See *Brown v. Board of Education*, 347 U. S. 483 (1954). Moreover, for a number of reasons, including the broad scope of the permitted search incident to arrest prior to *Chimel v. California*, 395 U. S. 752 (1969), and the uncertain meaning of a "search" prior to *Katz v. United States*, 389 U. S. 347 (1967), the profession formerly advanced different arguments against automobile searches than it advances today.

[6] Seizures of automobiles can be distinguished because of the greater interest of defendants in continuing possession of their means of transportation; in the case of automobiles, a seizure is more likely to be a greater intrusion than an immediate search. See *Chambers v. Maroney*, 399 U. S. 42, 51–52 (1970).

[7] Both cases would appear to fall within the majority's new rule. In *United States v. Chadwick*, 433 U. S. 1 (1977), federal agents had probable cause to search a footlocker. Although the footlocker had been placed in the trunk of a car and the occupants were about to depart, the Court refused to rely on the automobile exception to uphold the search. (It is true that the United States did not argue in this Court that the search was justified pursuant to that exception, but the theory was hardly so novel that this Court could not have responsibly relied upon it.) In *Arkansas v. Sanders*, 442 U. S. 753 (1979), too, the suitcase was mobile and police had probable cause to search it; it was carried in an automobile for several blocks before the automobile was stopped and the suitcase was seized and searched. Again, however, this Court invalidated the search.

[8] In a footnote, the Court appears to suggest a more pragmatic rationale for distinguishing *Chadwick* and *Sanders*—that no practical problems comparable to those engendered by a general search of a vehicle would arise if the official suspicion is confined to a particular piece of luggage. *Ante*, at 17, n. 21. This suggestion is illogical. A general search might disclose only a single item worth searching; conversely, pre-existing suspicion might attach to a number of items later placed in a car. Surely the protection of the warrant requirement cannot depend on a numerical count of the items subject to search.

plainly has peculiar and unworkable consequences: the Government "must show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located." *United States v. Ross*, 655 F. 2d 1159, 1202 (CADC 1981) (en banc) (Wilkey, J., dissenting).

Alternatively, the majority may be suggesting that *Chadwick* and *Sanders* may be explained because the connection of the container to the vehicle was incidental in these two cases. That is, because police had preexisting probable cause to seize and search the containers, they were not entitled to wait until the item was placed in a vehicle to take advantage of the automobile exception. Cf. *Coolidge v. New Hampshire*, *supra*; 2 W. LaFave, Search & Seizure 519–525 (1978). I wholeheartedly agree that police cannot employ a pretext to escape Fourth Amendment prohibitions and cannot rely on an exigency that they could easily have avoided. This interpretation, however, might well be an exception that swallows up the majority's rule. In neither *Chadwick* nor *Sanders* did the Court suggest that the delay of the police was a pretext for taking advantage of the automobile exception. For all that appears, the Government may have had legitimate reasons for not searching as soon as they had probable cause. In any event, asking police to rely on such an uncertain line in distinguishing between legitimate and illegitimate searches for containers in automobiles hardly indicates that the majority's approach has brought clarification to this area of the law. *Ante*, at 5; see *Robbins*, 453 U. S., at 435 (JUSTICE POWELL, concurring in the judgment)."

III

The Court today ignores the clear distinction that *Chadwick* established between movable containers and automobiles. It also rejects all of the relevant reasoning of *Sanders*[11] and offers a substitute rationale that appears inconsistent with the result. See *supra*, at ——. *Sanders* is therefore effectively overruled. And the Court unambiguously overrules "the disposition" of *Robbins*, *ante*, at 26, though it gingerly avoids stating that it is overruling the case itself.

The only convincing explanation I discern for the majority's broad rule is expediency: it assists police in conducting automobile searches, ensuring that the private containers into which criminal suspects often place goods will no longer be a Fourth Amendment shield. See *ante*, at 21–22. "When a legitimate search is under way," the Court instructs us, "nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion of the task at hand." *Ante*, at 23. No "nice distinctions" are necessary, however, to comprehend the well-recognized differences between movable containers (which, even after today's decision, would be subject to the warrant requirement if located outside an automobile), and the automobile itself, together with its integral parts. Nor can I pass by the majority's glib assertion that the "prompt and efficient completion of the task at hand" is paramount to the Fourth Amendment interests of our citizens. I had thought it well established that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U. S. 385, 393 (1978).[12]

This case will have profound implications for the privacy of citizens traveling in automobiles, as the Court well understands. "For countless vehicles are stopped on highways and public streets every day and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle." *Ante*, at 5. A closed paper bag, a tool box, a knapsack, a suitcase, and an attache case can alike be searched without the protection of the judgment of a neutral magistrate, based only on the rarely disturbed decision of a police officer that he has probable cause to search for contraband in the vehicle.[13] The Court derives satisfaction from the fact that its rule does not exalt the rights of the wealthy over the rights of the poor. *Ante*, at 23–24. A rule so broad that all citizens lose vital Fourth Amendment protection is no cause for celebration.

I dissent.

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[11] Unless one of these alternative explanations is adopted, the Court's attempt to distinguish the holdings in *Chadwick* and *Sanders* is not only unpersuasive but appears to contradict the Court's own theory. The Court suggests that in each case, the connection of the container to the vehicle was simply coincidental, and notes that the police did not have probable cause to search the entire vehicle. But the police assuredly did have probable cause to search the vehicle *for the container*. The Court states that the scope of the permitted warrantless search is determined only by what a magistrate could authorize. *Ante*, at 25. Once police found that container, according to the Court's own rule, they should have been entitled to search at least the container without a warrant. There was probable cause to search and the car was mobile in each case.

[12] The Court suggests that it rejects "some of the reasoning in *Sanders*." *Ante*, at 26. But the Court in *Sanders* unambiguously stated: "[W]e hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U. S., at 766. The Court today instead adopts the reasoning of the concurring opinion of THE CHIEF JUSTICE, joined by JUSTICE STEVENS, who refused to join the majority opinion because of the breadth of its rationale. *Id.*

[13] Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most "efficient" form of government?

The Court purports to restrict its rule to areas that the police have probable cause to search, as "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ante*, at 25. I agree, of course, that the probable cause component of the automobile exception must be strictly construed. I fear, however, that the restriction that the Court emphasizes may have little practical value. See *United States v. Ross*, 655 F. 2d 1159, 1168, n. 21 (CADC 1981) (en banc). If police open a container within a car and find contraband, they may acquire probable cause to believe that other portions of the car, and other containers within it, will contain contraband. In practice, the Court's rule may amount to a wholesale authorization for police to search any car from top to bottom when they have suspicion, whether localized or general, that it contains contraband.

ANDREW L. FREY, Deputy Solicitor General, Justice Department, Washington, D.C. (REX E. LEE, Solicitor General, D. LOWELL JENSEN, Assistant Attorney General, JOSHUA I. SCHWARTZ, Assistant to the Solicitor General, and JOHN FICHTER DE PUE, Justice Department attorney, with him on the brief) for petitioner; WILLIAM J. GARBER, WASHINGTON, D.C. (DENNIS M. HART, with him on the brief) for respondent.

Nos. 80-2182 AND 81-11

INWOOD LABORATORIES, INC., ET AL.
80–2182 v.
IVES LABORATORIES, INC.

DARBY DRUG CO., INC., ET AL.
81–11 v.
IVES LABORATORIES, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Colorado Revised Statutes 1973

1982 CUMULATIVE SUPPLEMENT

VOLUME 8

1978 REPLACEMENT VOLUME

CRIMINAL JUSTICE AND CHILDREN'S CODE

This volume of the 1982 Cumulative Supplement contains all the laws of a general and permanent nature enacted or amended by the Fifty-first General Assembly at its First Regular Session in 1977 by House Bill No. 1589, effective July 1, 1978, and as amended by House Bill No. 1001, effective April 1, 1979, enacted by the Fifty-first General Assembly at its First Extraordinary Session in 1978 and by Senate Bill No. 101, effective July 1, 1979, enacted by the Fifty-first General Assembly at its Second Regular Session in 1978, by the Fifty-second General Assembly at its First Regular Session in 1979, by the Fifty-second General Assembly at its Second Regular Session in 1980, by the Fifty-third General Assembly at its First Regular Session in 1981, and by the Fifty-third General Assembly at its Second Regular Session in 1982, pertaining to Titles 16, 17, 18, 19, 20, and 21 of Colorado Revised Statutes 1973.

Edited, Collated, and Revised
Under the Supervision and Direction of the
COMMITTEE ON LEGAL SERVICES
by
DOUGLAS G. BROWN, OF THE COLORADO BAR,
REVISOR OF STATUTES
AND THE
OFFICE OF REVISOR OF STATUTES

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Published with Annotations through 641 P.2d 1252, 532 F. Supp. 138, 670 F.2d 1034, 102 S.Ct. 1496, 16 B.R. 889, 53 Colo. L. Rev. 410, 59 Den. L.R. 625, and 11 Colo. Law. 1 through 11 Colo. Law. 1476

To be Reenacted by the General Assembly of the State of Colorado as the Statutory Law of Colorado of a General and Permanent Nature in the 1983 Session

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than does a person who is a private citizen. People v. Wolf, ___ Colo. ___, 635 P.2d 213 (1981).

Applied in People v. Lott, 197 Colo. 78, 589 P.2d 945 (1979).

16-3-202. Assisting peace officer - arrest - furnishing information - immunity.

Applied in People v. Lott, 197 Colo. 78, 589 P.2d 945 (1979).

PART 3

SEARCHES AND SEIZURES

16-3-301. Search warrants - issuance - grounds.

Applied in People v. Stoppel, ___ Colo. ___, 637 P.2d 384 (1981).

16-3-303. Search warrants - application.

II. CONTENT AND SUFFICIENCY OF AFFIDAVIT.

Judge must look within the four corners, etc.

In accord with original. See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

Affidavit interpreted with common sense. In interpreting an affidavit for a search warrant and the execution of the warrant, a common sense interpretation must be applied. People v. Del Alamo, ___ Colo. ___, 624 P.2d 1304 (1981).

Affidavit must supply underlying fact.

In accord with original. See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

Identification of wrong street not dispositive of affidavits efficacy. Fact that the affidavit identified the wrong street, which was less than one block away from the actual location of the truck to be searched, was not dispositive of an affidavit's efficacy. People v. Del Alamo, ___ Colo. ___, 624 P.2d 1304 (1981).

For evidence constituting probable cause. See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

A search warrant may be based on hearsay, etc.

In accord with original. See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

16-3-304. Search warrants - contents.

III. DESCRIPTION OF PROPERTY.

Search warrant reasonably specific under circumstances. See People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

In determining whether warrant is too general, the nature of the property to be seized must be considered. People v. Lindholm, 197 Colo. 270, 591 P.2d 1032 (1979).

16-3-308. Evidence - admissibility - declaration of purpose. (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer, as defined in section 18-1-901 (3) (l), C.R.S. 1973, as a result of a good faith mistake or of a technical violation.

(2) As used in subsection (1) of this section:

(a) "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.

(b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

(3) Evidence which is otherwise admissible in a criminal proceeding and which is obtained as a result of a confession voluntarily made in a noncustodial setting shall not be suppressed by the trial court.

(4) It is hereby declared to be the public policy of the state of Colorado that when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, that it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise admissible. This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

Source: Added, L. 81, p. 922, § 1.

Law reviews. For article, "Colorado's Good-Faith Exception to the Exclusionary Rule", see 11 Colo. Law. 410 (1982). For article, "Good-Faith Exception to the Exclusionary Rule: The Fourth Amendment is Not a Technicality", see 11 Colo. Law. 704 (1982).

PART 4

RIGHTS OF PERSONS IN CUSTODY

16-3-402. Right to communicate with attorney and family. (3) (a) The public defender, upon his request and consistent with the provisions of section 21-1-103, C.R.S. 1973, shall be permitted to communicate with any person in custody. If any person in custody indicates in any manner his desire to speak with an attorney, the public defender shall be permitted to communicate with that person to determine whether that person has counsel and, if the person desires that the public defender represent him, to make an initial determination as to whether the person is indigent.

(b) The public defender, upon his request and with due regard for reasonable law enforcement administrative procedures, shall be permitted to determine whether or not any person in custody has been taken without unnecessary delay before the nearest available county or district judge.

Source: R & RE, L. 81, p. 924, § 1.

Section codifies constitutional right to counsel. This section was enacted in 1972 as a part of the Colorado code of criminal procedure, and as such, the statute is merely a codification of the constitutional right to counsel in criminal cases. Cooper v. Director of Dep't of Revenue, 42 Colo. App. 109, 593 P.2d 1382 (1979).

16-3-404. Duty of officers to admit attorney.

Applied in Nees v. Bishop, 524 F. Supp. 1310 (D. Colo. 1981).

16-3-405. Strip searches - w
arrested for a traffic or a pe
arraignment, unless there is rea
a weapon or a controlled substa
is a parolee or an offender se
in the state or that the individu
ence of drugs.

(2) As used in this sectio
person re.ove or arrange som
a visual inspection of the genit
person.

(3) Any strip search that is
of the same sex as the arreste
cannot be observed by persons

(4) Every peace officer or
department conducting a strip
the police commander or an a
designated for the purposes of
this section.

(5) No search of any body c
without the written permission
or a sheriff or an agent thereof
must be performed under sani
physician or nurse.

(6) Any peace officer or en
department who knowingly or i
of this section commits secon
section 18-8-405, C.R.S. 1973. N
prosecution of a peace officer o
department under any other pro

(7) Nothing in this section s
common-law rights of any per
injunctive relief.

(8) The provisions of subse
when, following arraignment a
taken into custody by or remand

Source: Added, L. 82, p. 30

Cross references: For definition of
while under the influence of drugs", see

Release From Cus

PART 1

RELEASE ON BAIL

16-4-101. Bailable offenses.

ISSUE: Is 2/3 majority vote of legislature required to enact legislation limiting or amending the "exclusionary rule"?

Rule of Evidence - 412 is the actual "exclusionary rule".

Rule of Criminal Procedure - 37 (c) (copy attached) sets forth the procedure whereby the exclusionary rule can be invoked by motion to suppress.

Alaska Constitution, Article IV, Section 15, provides that court rules may only be changed by the legislature by a 2/3 vote.

TEST: Is proposed limitation or amendment substantive or procedural?

Rule 412. Evidence Illegally Obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under *Miranda v. Arizona,* 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights. (Added by Supreme Court Order 364 effective August 1, 1979)

Rule 412. Evidence Illegally Obtained.

Although illegally obtained evidence may be highly probative, this rule recognizes that such evidence must generally be excluded in order to breathe life into constitutional guarantees and to remove incentives for governmental intrusion into protected areas. While these rules of evidence generally do not incorporate constitutional doctrine, Rule 412 will go beyond what federal constitutional decisions require in protecting the rights of those accused of crime. Thus, for example, in *Harris v. New York*, 401 U.S. 222, 28 L.Ed.2d 1 (1971), the United States Supreme Court approved the use of statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966), for impeachment purposes but not as part of the prosecutor's case-in-chief. *Walder v. United States*, 347 U.S. 62, 98 L.Ed. 503 (1954), sanctioned the introduction of testimony on illegally seized heroin to rebut the defendant's denial of prior drug possession. Rule 412 would forbid such uses as long as proper objection is made by the defendant. This last proviso is a change from Criminal Rule 26(g).

This ban on the use of both testimonial and physical evidence for impeachment purposes should not amount to a significant incentive for defendants to commit perjury. The prosecution will still be able to cross-examine the defendant on his claims, if it believes in good faith that the defendant's testimony is false. And, as discussed below, some otherwise inadmissible evidence will still be permitted in perjury prosecutions.

Rule 412 also does not bar the use as impeachment evidence of statements made by a defendant who testifies on a preliminary question of fact as permitted by Rule 104(d). If the preliminary question of fact involves a constitutional question, the argument could be made that a ruling favorable to the defendant renders any statements made during the preliminary hearing "fruit of the poisonous tree" and therefore inadmissible. *Cf. Harrison v. United States*, 392 U.S. 219 (1968) (use of evidence in case-in-chief). *But see People v. Sturgis*, 317 N.E.2d 545 (Ill. 1974), *cert. denied*, 420 U.S. 936, 43 L.Ed.2d 412 (1975). *See also United States v. Kahan*, 415 U.S. 239, 39 L.Ed.2d 297 (1974); *United States v. Mandujano*, 425 U.S.

564, 584, 48 L.Ed.2d 212, 277 (1976) (Brennan, J., concurring in the judgment). Where the defendant is successful in suppressing evidence the underlying constitutional right is protected. It seems an extravagant extension of constitutional protection to permit one version of facts from the defendant's mouth to keep evidence from a tribunal and to permit the defendant to offer another version at trial. If the motion to suppress is unsuccessful, there is even less reason to refrain from using the defendant's statements in support of the motion as impeachment evidence. The decision to take the oath and testify is attenuation enough to remove the taint of the initial illegality. The record of the statements, the advice of counsel, and the oath together remove many of the problems associated with *Harris v. New York, supra.*

In perjury prosecutions, the government's interest in convicting guilty defendants and the extreme difficulty of obtaining reliable evidence warrant controlled use of illegally obtained evidence. Hence Rule 412 contains two narrow exceptions to the blanket prohibition on the use of illegally obtained evidence properly objected to.

The first exception governs statements obtained in violation of the right to warnings under *Miranda,* if the statement whose admission is sought is relevant to the issue of guilt or innocence and shown to be otherwise voluntary and not coerced. The latter limitation, meant to guarantee the statement's reliability, is derived from *Harris v. New York, supra,* where the U.S. Supreme Court observed, "Petitioner makes no claim that the statements made to the police were coerced or involuntary." 401 U.S. at 224, 28 L.Ed.2d at 4.

The second exception governs evidence obtained in violation of the fourth amendment and/or its Alaska counterpart, article I, section 14. Again a limitation is imposed: the evidence must be relevant to the issue of guilt or innocence, and must not have been obtained "in substantial violation of rights." This limitation is not imposed to ensure reliability of the evidence, but rather recognizes that judicial integrity requires the exclusion of evidence for all purposes if the police misconduct involved in obtained it was flagrant. The concept of a "substantial violation of rights" is necessarily flexible, and

whether or not such a violation occurred will depend on the facts of each case. The simple reference to "rights" is intended to emphasize that this section has no bearing on the law of standing in search and seizure cases.

HB 106

MSG 83-000003282 PRTY 1 01/24/83 12 28 07 ORIG: LA02 IN= 0004 OUT= 0054
FROM: SHIRLEE, ANCHORAGE LIO TO: POMS, JUNEAU INFO
TARGET: LJHL SUBJ: POM

1/24/83, SHIRLEE ANCH LIO, MSG 3282

TO: SENATOR KERTTULA, SENATE PRESIDENT
SENATOR RAY, CHAIRMAN, S JUD
SENATORS JOSEPHSON, ELIASON, PETTYJOHN, ZIEGLER

FROM: HOLLY PLOOG, REPRESENTING THE ANCH. POLICE DEPT. EMP. ASSOC.
701 W. 58TH, ANCHORAGE, AK 99502 (H) 276-3644

RE: SENATE BILL 49

ANCHORAGE POLICE DEPARTMENT EMPLOYEE ASSOC. STRONGLY SUGGESTS THAT THE SENATE JUDICIARY COMMITTEE WAIT UNTIL RESEARCH BEING PREPARED BY BARRY STERN IS COMPLETE BEFORE ACTING UPON SB 49. THE EXCLUSIONARY RULE NEEDS TO BE ALTERED. WE WOULD PREFER THAT THE LEGISLATURE LOOK AT THE ENTIRE PICTURE RATHER THAN PIECEMEALING THE LAW.

****

MSG 83 00002945 PRTY 1 01/21/83 10:30:28 ORIG: LA02 IN= 0001 OUT= 0013
FROM: SHIRLEE, ANC LIO TO: POMS, JUNEAU INFO
TARGET LJHL SUBJ: POM

1/21/83 SHIRLEE, ANC LIO, MSG 2945

TO: SENATOR KERTTULA
SENATOR JOSEPHSON
SENATOR PETTYJOHN
SENATOR ELIASON
SENATOR RAY
SENATOR ZIEGLER

FROM: DOLORES WEILER
FIELD DIRECTOR, ACLU OF ALASKA
SRA BOX 2094K
ANCHORAGE, AK 99507 (H) 344-7673

HAVE RECEIVED MANY CALLS THROUGHOUT STATE EXPRESSING CONCERN OVER RAMIFICATIONS OF SB 49. URGENTLY REQUEST HEARINGS BE HELD IN ANCH AND FBKS BEFORE THIS BILL PASSES COMMITTEE.

January 24, 1983

Silas Wasserstrom, Esq.
Associate Professor of Law
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001

Re: Exclusionary Rule

Dear Professor Wasserstrom:

I am counsel to the Alaska State Senate Judiciary Committee.

This session, our committee has before it a bill seeking to enact a good faith exception to the exclusionary rule along the lines recently proposed in Congress, pursuant to which you testified before the House Judiciary Sub-Committee on Criminal Justice.

As you may recall, Sue Marie Johnson of the Police Executive Research Forum also testified at the sub-committee hearings.

Attached hereto please find a detailed summary of Ms. Johnson's testimony setting forth her organization's recommendations regarding the exclusionary rule.

It would be most helpful to our committee to obtain your detailed comments about Ms. Johnson's proposal. I have already provided copies of the 1981 Georgetown Law Journal article you co-authored to all our committee members.

For example, one question that quickly comes to mind upon reading Ms. Johnson's proposal is your point about the good faith exception stifling the development of Fourth Amendment Law. Is this still true in light of her proposed procedure whereby the first issue determined by the Trial Court is whether the search and seizure is constitutional?

The bill we are considering has already stirred up a great deal of widespread interest among groups of divergent views such as our State Attorney General's Office, local Bar Associations, the A.C.L.U. and others. Therefore, your assistance would be put to very good use in helping to frame

all the relevant issues and place them in the proper context.

If you wish, please feel free to contact me by phone, collect. I can be reached at (907) 465-4451 or 465-4452. Our time is three hours earlier than yours.

Very truly yours,

John C. Gabrielli
Counsel

JCG:jm

— GABRIELLI —

Uniform Law Memo

Published by the National Conference of Commissioners on Uniform State Laws Winter 1982-83

ULC creates a single condo, co-op & planned community 'package'

BY NORMAN GEIS

High land costs and the growing use of flexible zoning techniques provide powerful inspiration for real estate developers to try to squeeze more housing on less land. One result is the explosive growth in the number of projects served by community facilities owned or managed by condominium, cooperative and homeowner associations. In recent years, these shared-use projects have become known as common-interest housing communities.

For nearly two decades the predominant form of common-interest housing community has been the condominium. Widespread acceptance of the condominium form of ownership was produced by many causes. But underlying them all was the simple fact that the condominium form is supported by enabling legislation in every state while all other forms are creations of the common law.

Flawed legal structure

The remarkable success of the condominium obscured criticism of a material flaw in its time-honored legal structure. This flaw — which goes to the very essence of the condominium scheme of ownership — is the requirement that every unit owner must hold legal title to a fractional interest in the project common elements as a tenant in common with every other unit owner.

The resulting fragmentation of common element titles is the root cause of myriads of drafting complexities and of innumerable problems of condominium administration. Surprisingly, this cumbersome arrangement seems t have resulted from the blind assumption of early condominium legislation that the condominium regime must be operated by the unit owners acting together as an unincorporated association. Since such associations were not separate entities having the legal capacity to hold title to real estate, there simply was no place to lodge the common element titles except in the unit owners themselves.

Straightforward approach

The splintered ownership arrangement for community facilities in a condominium contrasts sharply with the straightforward scheme of ownership for such facilities in homeowner association regimes where common area titles are held in the name of the association rather than being fragmented among its members.

That single difference, more than any other, may explain why homeowner association regimes operate under the common law without benefit of statutory enablement while the condominium form only came into wide use after the first-generation enabling legislation of the 1960s.

In 1980, Uniform Law Commissioners took their first step toward statutory enablement of an alternative to the condominium by adopting the Uniform Planned Community Act (UPCA). UPCA not only codified the law of homeowner associations but also provided statutory enablement for a common-interest housing regime defined as a "planned community." UPCA permits title to all common areas — including hallways and

other interior spaces in a high-rise – to be held in the name of the governing association instead of being fragmented among its members.

In 1981, ULC adopted the Model Real Estate Cooperative Act (MRECA) which codified cooperative law and provided a statutory mechanism for characterizing cooperative apartment units as mortgageable interests in real estate.

Both UPCA and MRECA were closely patterned on the Uniform Condominium Act (UCA). They were drafted in anticipation of their ultimate consolidation into the Uniform Common Interest Ownership Act (UCIOA). That final step was taken during the 1982 ULC annual meeting.

UCIOA makes no substantive changes in UCA, UPCA or MRECA. Like them, it provides developers with the flexible legal tools they need to create common interest communities including the right to expand, contract, or change the function of a development to meet shifting market demands.

In addition, UCIOA provides purchasers of housing in cooperative and planned community developments with some consumer protection benefits that previously were available only to condominium purchasers. But most important of all, UCIOA provides a statutory framework for fair and efficient administration of housing regimes that, until UCIOA, were subject to the vagaries of the common law and the whims of the draftsman of the project documents.

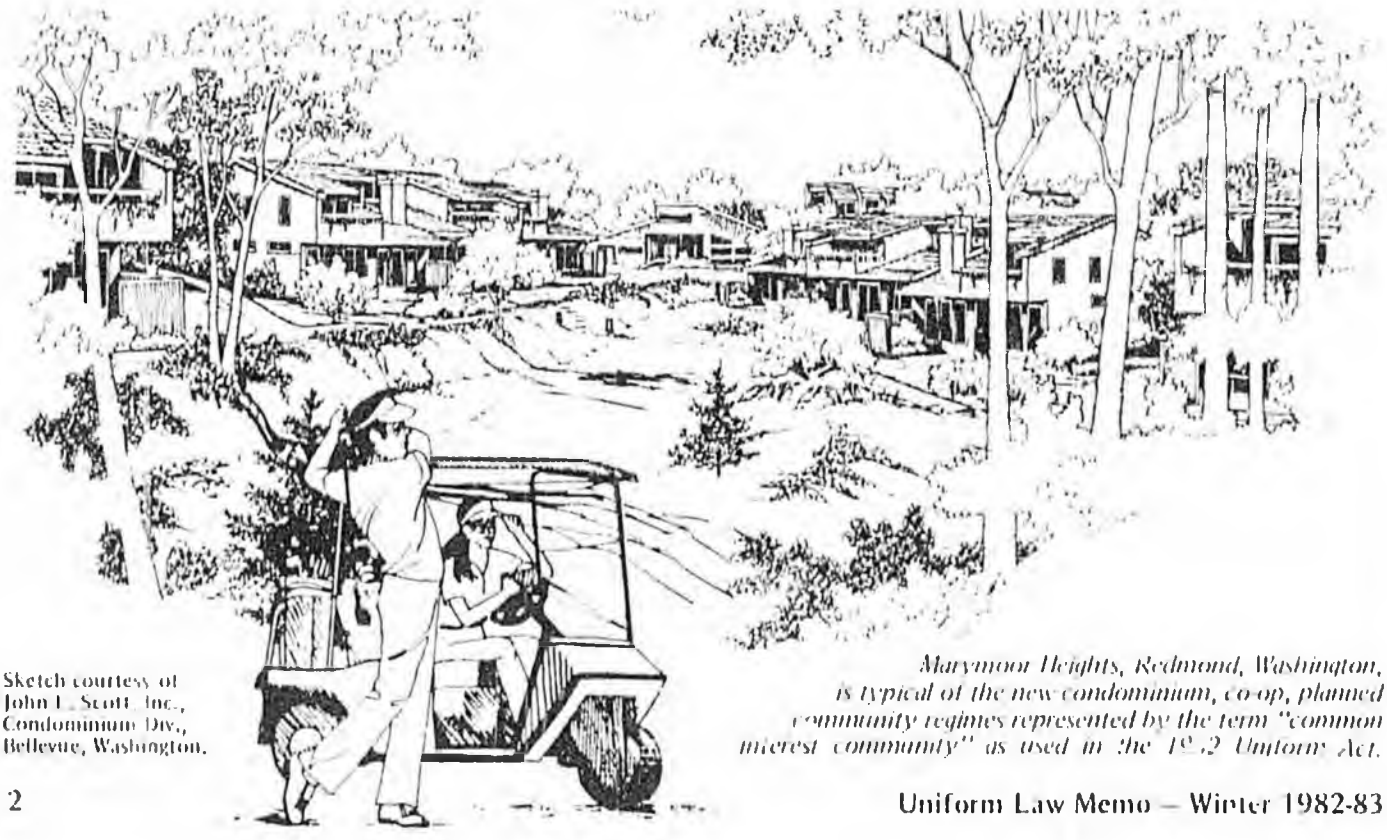
Seven states – four in 1982 – have adopted the Uniform Condominium Act. They are Maine, Minnesota, New Mexico, Pennsylvania, Rhode Island, Virginia and West Virginia. Virginia has also adopted the Model Real Estate Cooperative Act.

UCIOA does create a new defined term -- the "common interest community" – to collectively describe the condominium, cooperative and homeowner association regimes.

This new definition eliminates the need for repetition in UCIOA of the innumerable provisions of UCA, UPCA and MRECA which are identical in all three acts. The remarkable result is that the length of UCIOA is only slightly greater than the length of UCA alone. States which already have adopted UCA, or are contemplating its adoption, can easily transform UCA into UCIOA by a series of amendments which need only make necessary changes or additions to key UCA definitions and add a handful of special provisions unique to the regimes enabled by UPCA and MRECA.

UCIOA creates a new language that identifies and coheres the basic concepts that make the common-interest ownership community work. A broader understanding of its unifying concepts will encourage development of superior alternative forms of common interest developments drawing their enablement from UCIOA. These should displace the condominium as the reigning species.

Norman Geis served as the American Bar Association's liaison-adviser to the ULC drafting committees that prepared UCA, UPCA, MRECA and UCIOA. He practices law in Chicago with Greenberger, Krauss & Jacobs, Chartered.



Sketch courtesy of John L. Scott, Inc., Condominium Div., Bellevue, Washington.

Marymoor Heights, Redmond, Washington, is typical of the new condominium, co-op, planned community regimes represented by the term "common interest community" as used in the 1982 Uniform Act.

New Drafting Committees

ULC has created six new drafting committees. Two of them will be responsible for preparing preliminary drafts of projected additions to the Uniform Information Practices Code (UIPC).

If the project is completed, health and criminal records also would be governed by UIPC. The first part of UIPC, completed in 1980, deals with records maintained by state and local governments.

The proposed additions could add private health records – including those kept by hospitals and insurance companies – along with law enforcement agency records to UIPC. K. King Burnett, who practices law in Salisbury, Md., was appointed chairman of the Drafting Committee on Health Records. Northwestern University School of Law professor Harry B. Reese chairs the Drafting Committee on Criminal Records.

Other new ULC drafting committees are responsible for preparing preliminary drafts of the proposed:

Personal Property Leasing Act to provide a legal structure for the $100 billion-plus-a-year leasing industry which "rents" everything from television sets to oil rigs. The committee chairman is Edward I. Cutler who practices in Tampa, Fla.

Defense of Insanity Act to help states deal with a problem dramatized by the trial following the assassination attempt on President Reagan. Chairman of the committee is University of Pennsylvania School of Law professor Curtis R. Reitz.

Statutory Wills Act to design a low-cost solution to the problem of delivering high-quality legal work in will preparation. Committee chairman is Thomas L. Jones, a professor at the University of Alabama School of Law.

Revision of the Uniform Fraudulent Conveyance Act to conform the 1918 act – adopted by 26 states – to the Uniform Commercial Code, the Bankruptcy Code and the Model Business Corporation Act. Committee chairman is Morris W. Macey, who practices law in Atlanta.

Some of these committees are expected to have drafts ready for preliminary consideration during the 1983 annual meeting. That would make them eligible for completion during a subsequent annual meeting.

Court extends habitability warranty

The Illinois Supreme Court has extended the state's "implied warranty of habitability" for subsequent purchasers of new homes.

Allan Ashman said in the "What's New in the Law" section of the November, 1982, *American Bar Association Journal* that the court noted that "extending the implied warranty to subsequent buyers also was consistent with the Uniform Land Transactions Act."

Ashman wrote: "Section 1-312 of the act provides that a subsequent purchase carries with it an assignment of the seller's warranty of quality rights to the buyer."

The Illinois court said home buyers "traditionally assumed the burden of inequitable transactions, as the doctrine of *caveat emptor* dominated sales of real property well into the 20th Century." Therefore home buyers were forced to make claims for defects based on breach of contract by a builder for failing to perform in a workmanlike manner.

That view has changed. The Illinois court said that by 1980 at least 35 states had given home buyers some protection by implying a warranty of habitability. The Illinois court said this warranty was a "creature of public policy" – a "judicial innovation that has evolved to protect purchasers of new houses upon discovery of latent defects in their homes. While the warranty has roots in the execution of the contract for sale, we emphasize that it exists independently. Privity of contract is not required."

That was the policy followed by ULC in drafting the Uniform Land Transactions Act. ULTA, like the Illinois court, also extended this warranty to subsequent purchasers of a home.

The Illinois court said that "the subsequent purchaser should not be denied the protection of the warranty of habitability because he happened to purchase the home about one year after the original buyer.... The purpose of the warranty is to protect purchasers' expectations by holding building-vendors accountable. We do not believe it is logical to arbitrarily limit that protection to the first purchaser of a new house."

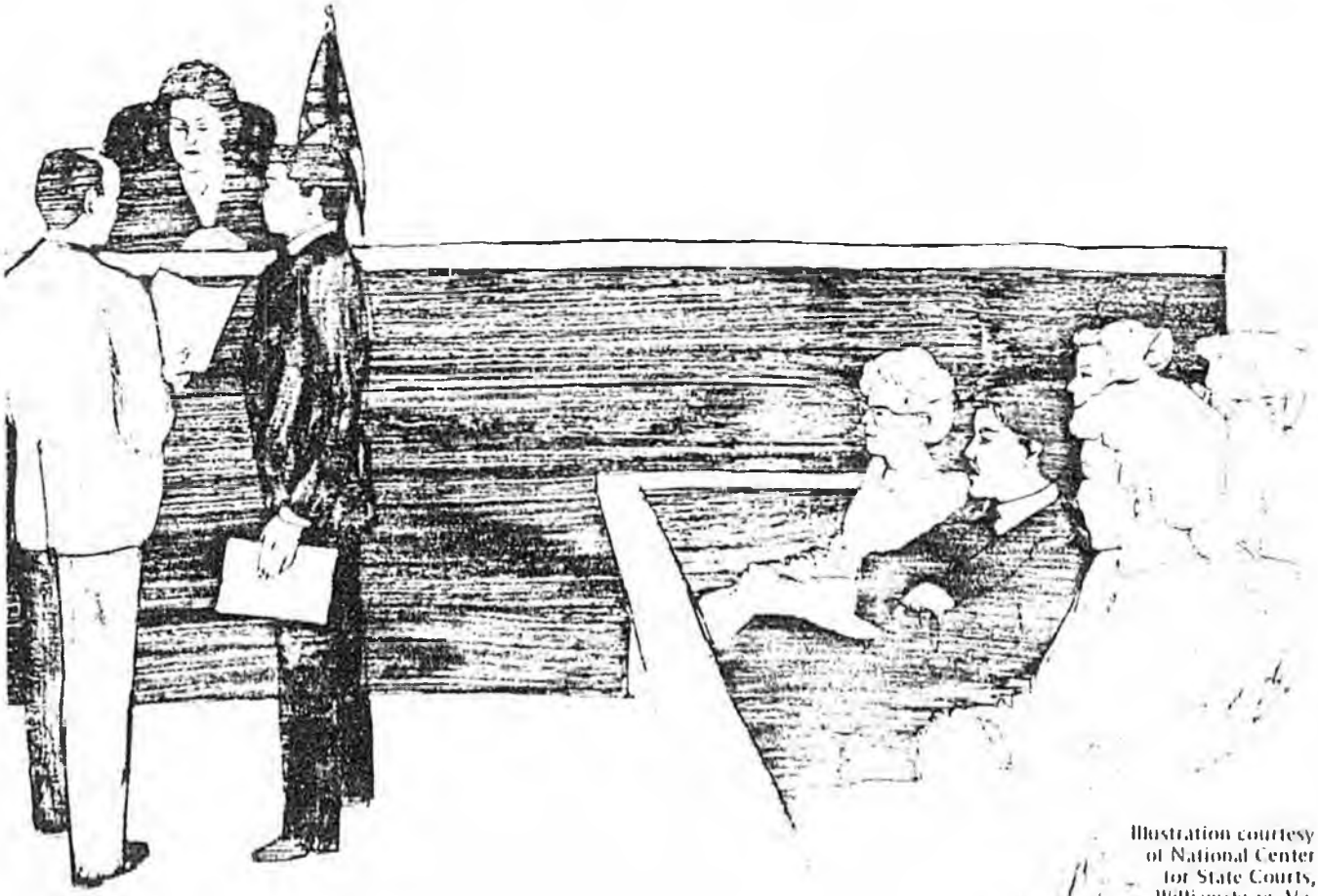


Illustration courtesy of National Center for State Courts, Williamsburg, Va.

Selecting Juries That Work

"It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this act to be considered for jury service in this state, and an obligation to serve as jurors when summoned for that purpose." — *Uniform Jury Selection and Service Act Declaration of Policy.*

Americans have a constitutional right to jury trials. The right is based upon the ideal that a group of citizens with a wide variety of educational, vocational and cultural backgrounds will produce a jury whose combined experience and wisdom will make fair decisions.

This ideal too often is not realized because many states rely on outmoded methods of selecting jurors. They build in "exemptions" for large portions of their populations by using lists that are biased against the poor, women, non-voters and others. Then they further dilute the talent available for juries by exempting lawyers, physicians, dentists, funeral directors, government officials, school teachers, mothers, newspeople, farmers, etc. And when called, too many Americans look for ways to "get out of jury duty."

This can result in a jury drawn from a "juror class" that excludes large segments of the population. In the 1960s, courts found this result conflicted with the ideal of "fair trials" and they questioned the validity of selection procedures at the state and federal level. This attack on the validity of juries centered on whether all citizens had an opportunity to be considered for service.

In 1968, Congress enacted the Federal Jury Selection and Service Act in an attempt to deal with the problem in the federal courts. In 1970, ULC completed its Uniform Jury Selection and Service Act and urged all states enact it.

The Uniform Act creates a system for insuring random selection of jurors from a "master list" that's based on voter registration lists, with additions from other sources such as "lists of utility customers, property (and income) taxpayers, motor vehicle registrations, and drivers' licenses."

Because of advances in computerization, creation of master lists by merging several lists and purging duplicate names is much easier now than when the act was first promulgated. For example,

Colorado uses three source lists – voter registration, drivers licenses and city directories.

"At one time, motor vehicle registrations were used," recalls Harry O. Lawson who was Colorado State Court Administrator when the Uniform Act was implemented in his state. "This list was discarded, because of male bias and duplication, and because we got tired of being the subject of news stories concerning the summoning of ABC company for jury duty. Other lists were examined but discarded also because of duplication and male bias – property tax lists, telephone directories and utility lists."

Broadened Base

Lawson, who now teaches at the University of Denver College of Law, believes that two more lists should be added to further broaden the base. But welfare recipient lists are barred by law and state income taxpayer lists could only be reached with a Colorado Supreme Court order that might result in an array or panel challenge that it would be forced to decide.

Once a master list is compiled, under the act, jurors are selected on a "key number" basis. This means that if there are 360,000 names on a master list and 4,800 prospective jurors are needed, then every 75th name on the master list will be selected. After a starting number is determined at random, a computer can produce the list of 4,800 prospects in moments by printing out the name and address of every 75th entry on the master list.

The Uniform Act makes it clear in Section 10 titled "No Exemptions" that "no qualified prospective juror is exempt from jury service."

Those not qualified include: non-citizens and non-residents; those under age or unable to read, speak and understand English; those who can prove that a physical or mental disability makes it impossible to serve; and convicted criminals who have lost their right to vote. Some states have disqualified those who are over 70 years old and have asked to be excused in writing.

Though automatic exemptions by class are prohibited, the act provides for excuses from jury service on proof of "undue hardship, extreme inconvenience, or public necessity." But such excuses are not easy to get and when the time allotted to take care of a problem expires, a prospective juror will be recalled.

In contrast, the federal act permits federal courts to specify classes which may be excused automatically. In some districts, such excuses have included: "ministers of the gospel," lawyers, physicians, surgeons, dentists, veterinarians, pharmicists, nurses, school teachers, mothers with children under 16, and sole operators of businesses.

ULC rejected any automatic excuse. Drafters commented that "there should be no automatic exemptions or excuses from jury service, but rather that excuse should be only upon a showing of actual need or public reason therefor. The Uniform Act proceeds on the principle that jurors should be selected by random methods from the widest possible list of citizens. The corollary is that actual service on the jury should be shared as widely as possible and, in particular, that professional and business groups should be excused only in cases of demonstrated need. The so-called 'blue ribbon jury' is outlawed by the Uniform Act. At the same time, business and professional groups within the community should not be permitted to avoid jury service. It is also believed that citizens in general will be more willing to perform jury service if it is known throughout the community that jury service is universal, barring only particular hardship in specific cases."

The difficulty in reaching the ideal expressed in that comment is dramatized in the state of the chairman of the drafting committee that developed preliminary drafts of the Uniform Jury Selection and Service Act – Vincent L. McKusick who then practiced law in Portland and who now serves as Chief Justice of the Maine Supreme Court. Maine adopted most of the act that McKusick guided to completion in 1972. But it didn't touch the laundry list of exemptions then and now in effect.

That means Maine's exemptions include: the governor, judges, court clerks, the secretary and treasurer of state, physicians, surgeons, dentists, sheriffs, lawyers, members of the National Guard and Reserves, retired officers and retired enlisted men holding the Certificate of Merit.

No Exemptions

States – such as Colorado – which eliminated all exemptions have been pleased with the results. The quality of juries has improved. This was dramatized when Colorado Gov. Richard D. Lamm was called for jury duty. Judges and others usually exempted from jury service also have been called in Colorado and other states without exemptions.

The act does protect jurors from serving too often because of the chance of the draw. It recommends that states limit the length and frequency of jury service to times that make sense when compared to need and the population pool.

The act also includes a section designed to protect jurors from employers. Section 17 states

(see JURIES, page 10)

7 ULC proposals ready for legislatures

1982 saw ULC complete seven new proposals. Six of them – Uniform Transboundary Pollution Reciprocal Access Act; Uniform Law on Notarial Acts; Uniform Guardianship and Protective Proceedings Act; Succession Without Administration amendments to the Uniform Probate Code; Uniform Conflict of Laws – Limitations Act; and Model Health-Care Consent Act – are described here. An article on the seventh, the Uniform Common Interest Ownership Act – begins on page one.

Succession Without Administration

The Uniform Probate Code (UPC) offers the most flexible system of estate administration available to states. Now the 14 states which have adopted the major provisions of UPC could offer their citizens the simplest of all administration schemes with no judicial interference.

"Succession Without Administration" amounts to acceptance of the assets and assumption of the debts of an undisputed estate by its heirs or devisees – whether or not there is a will. This sidesteps the traditional "executor" and attendant red tape.

"The concept of succession without administration is drawn from civil law and is a variation of the method which is followed largely on the continent of Europe, in Louisiana and in Quebec," say drafters of Succession Without Administration amendments to UPC.

The amendments would enable intestate heirs or "residuary devisees under a will" to become "universal successors" by filing an application with the probate court. An official of the court could approve an application as soon as five days after the decedent's death. If there were no challenges from other successors or creditors, and other simple criteria were met, the official could certify that the applicants were the universal successors to the assets of the estate and responsible for its liabilities and distribution.

"The liability of universal successors who assume the decedent's debts is subject to any defenses that would have been available to the decedent," the proposal states. "Other than liability arising from fraud, conversion or other wrongful conduct of a successor, the personal liability of each universal successor to any creditor, claimant, or other heir, devisee or person entitled to decedent's property shall not exceed the proportion of the claim that the universal successor's share bears to the share of all heirs and residuary devisees." Since the debts of the decedent might exceed the value of the estate, this procedure means that a successor's liability could exceed his share of the estate.

So if a family suspected that the assets of an estate would not cover its debts, the family could opt for appointment of a "personal representative" of the decedent. This would be a simple procedure that would limit liability to the value of the estate.

Drafters believe the Succession Without Administration concept should be added to the

probate law of every state. However, wide variations in the organization and content of these laws discouraged immediate preparation of a single text of the new proposal that would work well in all states.

Therefore, ULC limited itself to proposing a text that would work well in UPC states. In non-UPC states, the Succession Without Administration amendments to UPC will serve to publicize and illustrate the new concept and will be useful as a model to be adapted to their statutes until a "free-standing" act can be developed.

States presently counted as enacting UPC or equivalent legislation are: Alaska, Arizona, Colorado, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania and Utah.

Several other states — including Alabama, Hawaii, Maryland, Oregon and Wisconsin — that have accepted most of UPC's non-procedural provisions regarding intestate and testate succession probably would be classified as UPC states if they were to enact adaptations of the Succession Without Administration amendments.

Notarial Acts

A Uniform Law on Notarial Acts has been developed to "define the content and form of common notarial acts."

The new Uniform Act replaces two earlier ULC proposals — the Uniform Acknowledgments Act (adopted in 1939 and revised in 1960), and the Uniform Recognition of Acknowledgments Act (completed in 1968). The first was adopted by 26 states and the latter by 18.

ULC urges every state to adopt the new proposal which represents "a consolidation, extension and modernization of the two previous acts."

"It consolidates the provisions of the two acts relating to acknowledgments of instruments," drafters said. "It extends the coverage of the earlier act to include other notarial acts, such as taking of verifications and attestation of documents. It also modernizes the law by recognizing contemporary practices. In addition, the act seeks to simplify and clarify proof of the authority of notarial officers."

The new act defines a notarial act as "any act that a notary public of this state is authorized to perform, and includes taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument."

The new Uniform Act permits use of short, simple forms used as examples in the act as well as "the more elaborate forms" of the earlier ULC legislation.

Conflict of Laws

In today's mobile society, many legal disputes that once would have been purely local in nature now involve contacts with two or more states. Contracts often involve a seller in one state dealing with a buyer in another.

An automobile accident may involve a driver from State A whose car — manufactured in State B and purchased in State C — collides with a car from State D on highways of State E. "Conflict of laws" ("conflicts" for short) is the area of law that deals with deciding which state's law to apply in such cases.

One of the difficult conflicts problems is deciding which state's statute of limitations to use. Some differences between the laws of different states may be minor, but the decision to apply one or another state's statute of limitations may mean life or death for a case.

A once common answer to the problem was to apply the statute of limitations of the state where the case was brought, regardless of where the dispute arose or what state's law would be applied to other issues in the case. The idea was that a statute of limitations was "procedural," and a court would always apply its own procedure, even when applying the substantive law of another state.

The procedural approach proved too simplistic, however, and most states adopted statutes that provided their own solutions to the problem. No two solutions were the same. Often drafters of statutes had not anticipated the variety of circumstances their statute might cover. Sometimes their wording produced unintended and unfair results.

ULC has drafted a new approach to the problem — a Uniform Conflict of Laws — Limitations Act.

The new Uniform Act offers a different sort of "limitations borrowing statute." It takes the general approach that when a court decides to apply the substantive law of another state, it should also apply that state's statute of limitations.

But the new act also provides an "escape clause" to the general rule in a section labeled "unfairness." When the limitations period of the

state law which is being used in a case "is substantially different" from that of the forum state "and has afforded no fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim" then the forum state's limitations period would be used. Drafters said this provision "is not designed to afford 'an easy escape,'" but will give reasonable assurance of a fair and just result, as far as the statute of limitations is concerned, in each individual case.

Guardianship & Protective Proceedings

ULC believes state courts should "limit guardianships...to encourage the development of maximum self-reliance and independence" of incapacitated persons.

"Pressure to add 'limited guardianship' concepts to UPC (Uniform Probate Code) grew out of the recommendations of an American Bar Association project, the ABA Commission on the Mentally Disabled, which, in relation to guardianship other than for minors, recommended that state laws be changed to avoid an asserted 'overkill' implicit in standard guardianship proceedings," according to drafters of the Uniform Guardianship and Protective Proceedings Act. "In part, this occurs, it was asserted, because a finding of incompetence has been the traditional threshold for appointment of a guardian.

"Thus, in consequence of appointment of a guardian, all personal, legal autonomy is stripped from the ward and vested in the appointing court and guardian. The call for 'limited guardianships' was a call for more sensitive procedures and for appointments fashioned so that the authority of the protector would intrude only to the degree necessary on the liberties and prerogatives of the protected person."

Incapacitated persons

When the commission released its report, UPC proponents maintained that the code which replaced the term "incompetence" with a more precise definition of an "incapacitated person" already provided for limited guardianship and conservatorship.

UPC defines an "incapacitated person" as anyone "who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions."

But when Idaho – the first state to adopt UPC – enacted a new limited guardianship statute without even repealing UPC guardianship provisions, ULC decided it must act to "include explicit language dealing with limited guardianship" in UPC before the situation became even more confused.

Therefore, drafters developed a Uniform Guardianship and Protective Proceedings Act – for adoption by non-UPC states – which also would amend Parts 1, 2, 3 and 4 of Article V of UPC to make it clear that it encouraged "limited guardianship."

Clarifies authority

Like UPC, the free-standing act also encourages courts to appoint conservators – concerned solely with property management – instead of guardians. The new act makes it clear that courts have the authority to limit the powers of a conservator as well as those of a guardian. Also a court could appoint a conservator for particular property leaving other property in the control of a protected person.

Whether guardianship or conservatorship proceedings are involved, the proposal will facilitate court use of s[illegible]eral competencies regarding how necessary state assistance for afflicted persons can be provided with least disturbance to normal independence.

The Uniform Act also authorizes parents and spouses to use a witnessed paper other than a will, as well as a will, to designate a guardian to replace themselves as protectors of their minor children or of the other spouse.

Health Care Consent

Judges have made it clear that an adult with a "sound mind" has a right to consent to – or refuse – medical treatment.

"What if the human being is not of adult years and of sound mind or is otherwise unable to consent?" asked drafters of the Model Health-Care Consent Act. "These questions plague hospital administrators, physicians and surgeons daily. They are also of grave importance to patients, their families and friends. Some certainty in this area of the law is needed for all participants in the health care system, consumers as well as providers."

Certainty is the goal of the Model Health-Care Consent Act which focuses on "who" can consent.

"(It) is procedural in nature and is purposefully narrow in scope," drafters said. "Its primary aim is to provide authorization to consent to health care. It does *not* address the substantive issue of consent; for instance, what constitutes informed consent, whether informed consent is required or under what circumstances one has a right to refuse treatment...

"(It) is drafted to provide answers for the cases that occur daily and routinely in medical practice. It is not designed to provide answers for the extraordinary cases, such as terminal illness, organ donation, and the treatment of mental illness. These extraordinary cases present separate and discrete problems involving not only issues of competency but of the authority of a substitute decision-maker as well. To force a uniform solution to these many problems would be at best a procrustean fit. To provide a statutory solution to the problem of the administration of antipsychotic medication . . a noninstitutionalized incompetent person which is consistent with the due process clause would be completely unworkable if the problem to be solved is how to render treatment to a child with a broken arm while its parents are on an extended trip."

Provides a guide

Drafters tried to "replace the murkiness of custom with the clarity of legislation and to provide guidance for those involved daily with the problem of how medical decisions are to be made for an individual who cannot do so for himself."

The act is built on a definition of an "individual who may consent to health care." The definition includes adults and minors who were emancipated; had reached a recommended age of 14 and were living away from their parents and managing their own affairs; were or had been married; were in the military; or were authorized to consent under other state laws such as those permitting minors to consent to treatment for alcohol or drug dependency.

If a physician determined that a patient was capable of consenting, treatment decisions would be up to the patient. But if the patient was incapable of consent, then physicians would be required to find a proxy to "stand in his shoes."

If the patient incapable of consenting was an adult, the first choice would be a "health-care representative" who had been appointed by the patient when he was capable of consent. The act would require such appointments to be made in writing. Health care representatives would be required to "act (i) in the best interest of the appointor consistent with the purposes expressed in the appointment; and (ii) in good faith."

ULC said providing for appointment of health-care representatives was consistent with the Uniform Durable Power of Attorney Act which has been adopted in about 30 states. In those states, the power to make such an appointment already exists. By incorporating the concept into the Model Health-Care Consent Act, ULC hopes to bring this power "to the attention of persons not aware of the Durable Power Act."

Priorities set

If there was no health-care representative, top priority would be given to a court appointed guardian or representative. Next in line would be a spouse, parent, adult child, or adult sibling. However, an adult who did not choose to appoint a health-care representative while capable of consent could disqualify a specific person from consenting to his health care. Such disqualifications also would be in writing.

If a patient was a minor not authorized to consent, the first priority again would be given to a court-appointed representative. The next priority would be given to a parent, or "an individual in loco parentis." Next physicians could look to a minor's adult siblings for consent. The act also would permit individuals "authorized to consent to health care for another" to delegate their consent authority if they were to be unavailable.

"This provision would be helpful in situations in which parents want to delegate health-care decision-making to a temporary custodian of their children, for instance when parents plan to be away or when a child is at camp."

Other laws stand

ULC made it clear that its proposal would not affect other state laws that might deal with such problems as withdrawal of life support systems or diagnosis and treatment of mental illness. For example, draftsmen commented:

"The law with respect to withdrawal of life support systems in the case of the terminally ill is changing rapidly. At least 10 states have Natural Death Acts and there have been several court decisions concerning the issue of termination of treatment. Nothing in this (proposal) changes existing law in that regard. All proxy decision-makers are charged with acting in the best interest of the patient who is incapable of consenting. If a patient had appointed a health-care representative and had made known his wish that life support systems be withdrawn in the event of terminal illness, many courts would consider that evidence conclusive of the patient's best interest. However,

this (proposal) does not provide an answer to the question of what is in the patient's best interest in such a circumstance."

Transboundary Pollution

Pollution doesn't recognize state — or international — boundaries. But most legal procedures do. That means New Yorkers whose lakes or forests are damaged by pollution originating in Canada probably will find that they lack the legal tools to stop emission of offending toxic materials, or to recover their losses.

ULC and the Uniform Law Conference of Canada created a joint drafting committee to seek a solution to this problem. The result is a Uniform Transboundary Pollution Reciprocal Access Act.

The Uniform Act is designed to overcome what its drafters describe as "a generally recognized rule of law in the Anglo-American tradition that actions for damages for trespass, nuisance or negligent injury in respect to lands located in another state are local actions and may be brought only in the state where the land is situated."

The Uniform Act would eliminate this problem when both the state or province where the pollution originated and the state or province where the damage was inflicted had adopted the proposed act or provided "substantially equivalent access to its courts and administrative agencies." Minnesota is an example of a jurisdiction that already provides access to its courts for non-resident pollution victims.

Substantive sections of the Uniform Act would permit alleged pollution victims to seek remedies in the courts of their state or province or in the U.S. or Canadian jurisdiction where the pollution originated. Victims or potential victims also could seek a remedy through administrative agencies — state environmental protection agencies, for example — of the states where the pollution originated.

Impetus for development of the proposal was provided by a 1979 report of the Canadian Bar Association and the American Bar Association on The Settlement of International Disputes Between Canada and the U.S. The report recommended creation of a liaison group of Uniform Law Commissioners of the U.S. and Canada. This evolved into a drafting committee on transfrontier pollution — one of the problems pointed up by CBA and ABA.

This is the first time that Uniform Law Commissioners of the U.S. and Canada have worked together to draft a proposal designed to be used in both the states and provinces.

Juries *from page 5*

that employers shall not fire, threaten or "otherwise coerce" an employee who is called or serves as a juror. Both monetary and criminal penalties are permitted for a violation. Discharged employees also may sue to recover lost wages and jobs.

Nine states have enacted the Uniform Jury Selection and Service Act in some form. Colorado, Idaho and North Dakota all enacted the complete act for all courts in their states in 1971. Maine adopted the bulk of the act in 1972. Michigan and Indiana adopted the act for their more populous counties in 1973. Mississippi adopted its version of the act in 1974. Minnesota adopted the act retaining an exemption only for legislators in 1977 and Utah adopted the complete act in 1979.

All nine states report that the act has been a success. For example, Lawson said that adoption of the act "has been very beneficial for Colorado."

"Prior to adoption of the Act, Colorado had almost as many ways of selecting jurors and granting excuses as it has counties," Lawson said in a letter to Judge Robert P. Fullerton who serves as a Colorado commissioner on uniform laws. "In many parts of the state, there was no way a challenge to the array had the issue been raised could be successfully defended. I hesitate to put on paper my recollections of how jurors were selected in some counties.

"The Uniform Act, as you know, eliminated exemptions, established grounds for excuses, and made the use of automation possible. The use of automation, in turn, made it possible to use additional source lists along with voter registration. It also provided the foundation for one day-one trial and similar reforms."

ULC legislative director John M. McCabe believes that more states should consider adopting the act.

"I've never heard of a challenge of an array being successful in any jurisdiction operating under the act," McCabe said. "And when it's coupled with computerization, it has saved money for court systems. If states want better juries for fairer trials, they should adopt it for all jurisdictions."

Davis praises '81 MSAPA

In the 1982 supplement to his *Administrative Law Treatise*, Kenneth Culp Davis said the 1981 revision of the Model State Administrative Procedure Act "is all along the line much superior to the 1961 version. Indeed, although many positions taken are inescapably controversial, the new Model Act in general achieves the objective of being a model of what a state APA should be."

Davis — whose treatise was first published in 1958 and who is generally recognized as one of the leading authorities on administrative law — pointed to several provisions of the 1981 MSAPA as "outstanding," "superior," and "excellent." These included provisions:

• Mandating that state agencies codify in rules any principles of law or policy that it adopts through decisions in individual cases. Davis quoted the MSAPA commentary to this provision which said "law and policy expressed in rules gives (members of the public) fairer notice than case precedent....Law or policy expressed in rules is also frequently more easily understandable to laymen than case precedent, and is always more highly visible to those who monitor the performance of agencies....Only by the enactment of a statutory provision of the type recommended here, therefore, can agencies be *forced* to codify in rules principles of law or policy they may lawfully declare in decisions in particular cases, and may lawfully rely on a precedent....If an agency breaches...its duty...to issue such a rule displacing a line of its precedent, the agency may not subsequently rely on that line of precedent." Davis said this provision was "well ahead of federal law."

• Granting a governor the authority to "rescind or suspend all or a portion of a rule of an agency. In exercising this authority, the governor shall act by an order that is subject to all requirements applicable to the adoption and effectiveness of a rule." The provision does *not* give a governor authority to adopt agency rules.

• Creating some less-than-formal types of adjudicative procedure which agencies may use instead of the formal hearing in appropriate types of cases. Davis said that these less-than formal procedures — the conference adjudicative hearing, the summary adjudicative proceeding and the emergency adjudicative proceeding — represent "clear advances." But in his opinion, MSAPA has one weakness. It gives an agency a choice as to whether to use the formal hearing or one of the less-than-formal procedures in situations where "there is no disputed issue of material fact." According to Davis, formal hearings should never be used in these situations, although he concedes that the MSAPA approach probably conforms to "dominant assumptions and...practices" by giving an agency a choice. Davis recommends that MSAPA be amended to compel an agency to use one of the less-than-formal procedures in adjudication of any case in which there is no disputed issue of material fact. This could be accomplished simply by changing "may" to "must" in the provisions regarding use of less-than-formal procedures.

• Eliminating technicalities involved in judicial review. Davis said this made MSAPA superior to federal law which continues to include "technicalities about injunction, declaratory judgment, writs of mandamus, actions in the nature of mandamus, habeas corpus, and various other remedies."

Viewing MSAPA as a whole, Davis concludes:

"Although many refinements are susceptible of different opinions, the superiority of the new Model Act over the 1946 and 1961 versions fully reflects the advances in administrative law thinking, and in some respects the new draft is providing a leadership in the direction of a better system."

Journal features A-V Act

An Ohio lawyer recommends the Uniform Audio-Visual Deposition Act as an "excellent source of help" when an opponent or trial judge has "little or no experience with video."

Thomas J. Murray, Jr., of Sandusky said in a November, 1982, *American Bar Association Journal* article on "Video Depositions: Putting Absent Witnesses in Court":

"The proposed act offers a step-by-step model for dealing with most of the procedural problems that might arise in a video deposition from notice to courtroom replay. In a jurisdiction without well-settled video rules, this procedure is helpful.

"Along with a standard deposition notice advising your opponent that the deposition will be recorded by videotape, send a letter to your adversary suggesting that the deposition be taken in accordance with the provisions of the act and include a copy of the proposed rules..."

North Dakota has adopted the act. Several other states are expected to consider it in 1983.

Public hearing scheduled on Marital Property Act

A public hearing on a proposed state Marital Property Act has been scheduled for Feb. 18, 1983, in Washington, D.C.

The hearing will focus on a preliminary draft of the proposal. The new draft – scheduled for completion and distribution in late December – will incorporate more than two years of work by the committee and reflect comments and suggestions from Uniform Law Commissioners, advisors, legal and women's organizations and others interested in the problem.

The drafting committee must deal with such problems as:

- Defining marital and individual property, which can be as important to creditors – including former spouses and children of former marriages – as it is to marriage partners.
- Whether "interspousal remedies" should be available to help marriage partners enforce their marital property rights.
- Rights of surviving spouses.
- Should benefits of "pension plans" be considered property of the marriage partnership or the spouse who "earns" them.

The hearing is scheduled to begin at 9 a.m. in the Hyatt Regency on Capitol Hill. Copies of the draft will be available for $2 a copy from ULC headquarters by writing or calling: National Conference of Commissioners on Uniform State Laws, Suite 510, 645 North Michigan Ave., Chicago, IL 60611 (phone 312/321-9710).

William C. Hillman of Providence, R.I., chairman of the ULC Drafting Committee on Marital Property Act, urges those who want to suggest changes in – or support – the policies or details of his committee's work to submit their comments in writing to ULC headquarters before or after the public meeting. This will facilitate their consideration.

Other members of the drafting committee on the act include: George C. Berk, also of Providence; Peter J. Dykman, Madison, Wis.; Bion M. Gregory, Sacramento, Calif.; Linda Judd, Post Falls, Idaho; Henry D. Stratton, Pikeville, Ky.; and Richard V. Wellman, a law professor at the University of Georgia School of Law. Reporter-draftsman for the committee is William P. Cantwell, Denver.

The committee is expected to have a draft eligible for final "consideration" during next summer's annual meeting of ULC. If the proposal is completed and adopted as a ULC product, it will be promulgated to the states for their consideration.

Uniform Law Commissioners

ULC is a confederation of state commissioners on uniform laws. The first commissioners, appointed by seven of the then 34 states, met in Saratoga, N.Y., in 1892. Membership now consists of some 300 practicing lawyers, judges and law professors. They are elected by each of the 50 states, the District of Columbia and Puerto Rico to draft legislation addressing problems common to all states, and to bring about uniformity of the law across state borders where that is seen as desirable and practicable.

Uniform Law Memo is prepared by Communicate!
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Exclusionary rule: help or hindrance?

by Timothy Harper
Associated Press

New York — In these days of rising crime, public outrage boils and bubbles each time the courts dismiss charges against a criminal defendant or grant a convict a new trial because of a "legal technicality."

The "technicality" often is the exclusionary rule, which holds that evidence obtained illegally — when police violate someone's constitutional rights — cannot be used in court against the person.

The rule is under strong criticism from the Reagan Administration and others who see it as thwarting police investigations, hampering prosecution strategy and too often freeing convicted criminals.

Many ordinary citizens take a dim view, too. An Associated Press-NBC News national poll last month put this question: "The law now says that judges must throw out evidence which police obtain illegally. Would you favor a change so that more of this evidence can be admitted, or do you think the law should be kept as it is?"

Fifty-three percent of those polled favored a change, 41 percent opposed it, while 6 percent weren't sure.

Defenders of the rule, like the American Bar Association and the American Civil Liberties Union, argue that it is a free society's main guarantee against police harassment of innocent citizens.

Unlike most U.S. law, the exclusionary rule has never been approved by Congress. Instead, it is a creature of the judicial system, court-made law that was born and grew out of U.S. Supreme Court rulings interpreting the Constitution.

The court enunciated the rule, which is the only constitutional limitation common to all law enforcement investigations, for federal authorities in 1914. By the time the Supreme Court expanded it to cover all state and local police in 1961, the courts in most states had been following it for years.

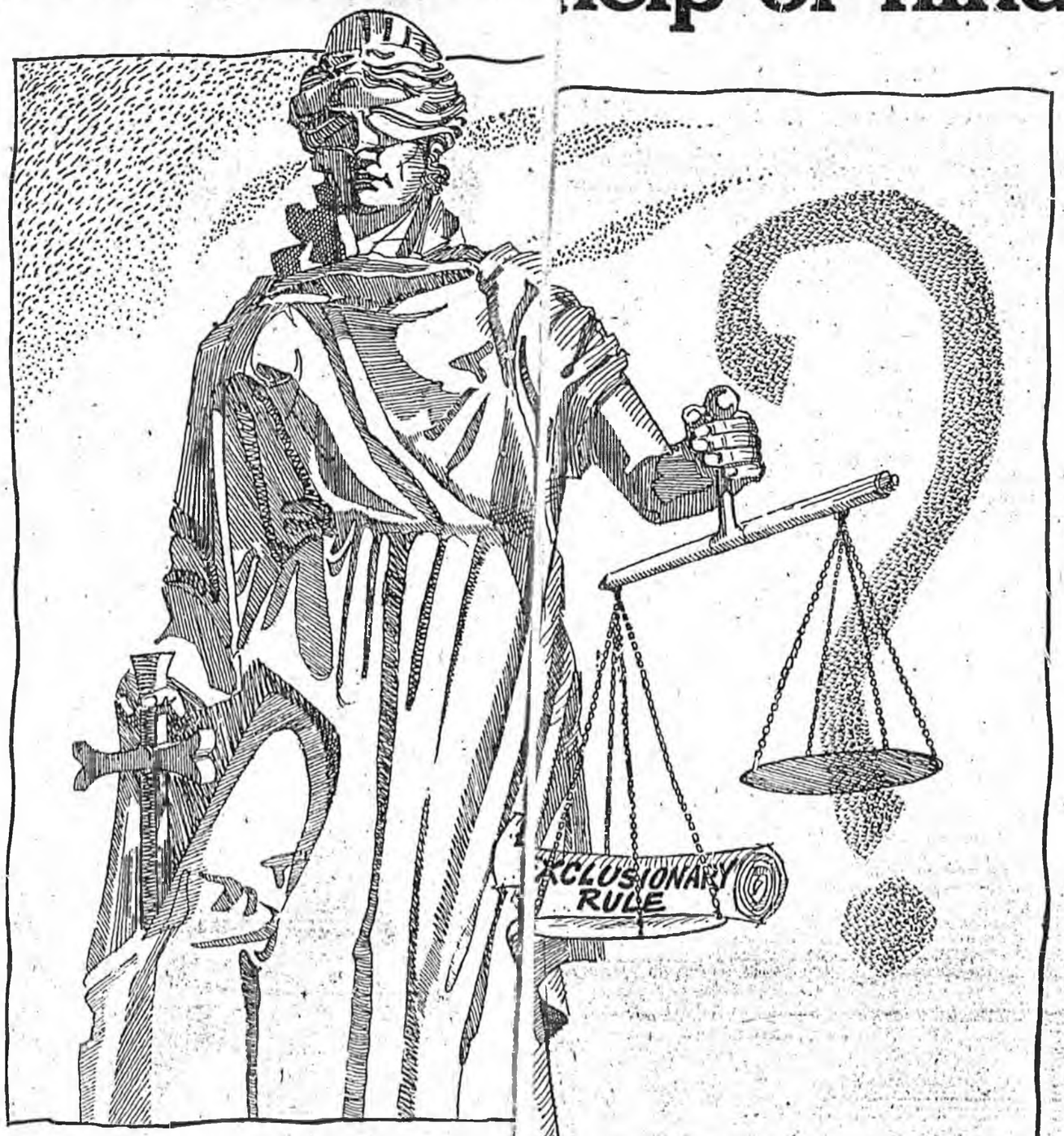
The rule is most often applied to evidence police obtain in violation of the Fourth Amendment's prohibitions against unreasonable searches and seizures.

In the past 20 years, the U.S. Supreme Court has thrown out convictions in 70 Fourth Amendment exclusionary rule cases.

But those 70 Supreme Court precedents have led to reversals of certainly hundreds and probably thousands more convictions in state and lower federal courts, and kept prosecutors from filing charges in untold criminal investigations at all levels.

In a speech in New Orleans last September, President Reagan said: "This rule rests on the absurd proposition that a law enforcement error, no matter how technical, can be used to justify throwing an entire case out of court not matter how guilty the defendant or how heinous the crime."

Chief Justice Warren Burger has criticized the rule as a search for procedural purity rather than truth or justice. Dissenting in past court cases upholding the rule, he has called on Congress to change it so that more evidence will be admitted.



There are two proposals pending before the U.S. Senate to weaken the rule, and a presidential task force headed by Attorney General William French Smith has offered another.

But supporters echo past Supreme Court reasoning that the rule avoids the taint of collusion between police and the courts in gaining convictions, prevents the government from profiting from its misdeeds and ensures public trust in the fairness of the judicial system.

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence," the court said in the 1961 case.

A current case where the exclusionary rule is an issue is that of Lawrence and Judy Watson. The Watsons claim 10 police officers, acting on an informant's tip but without a warrant, broke into and ransacked their suburban Dallas home last March. They say the officers shot their dog, beat Watson and forced his wife to stand naked while they cursed her.

Eventually, the Watsons were arrested for possession of lidocaine, a cocaine substitute. The charge is a misdemeanor.

The Watsons will argue that the Balch Spring, Texas, police violated the Fourth Amendment's guarantees against unreasonable searches and seizures because there was insufficient "probable cause" for the search.

If the judge hearing their case agreed, prosecutors would not be allowed to introduce evidence about the drugs that were found. No drugs, no case, and the charges would almost surely be dismissed.

Even if the Watsons lost, however, they could appeal to a higher court to have their convictions overturned.

The exclusionary rule is the doctrine that says police cannot question people just because they are black or have criminal records. It is the doctrine that says police cannot arrest someone "for investigation."

It is the doctrine that says police cannot stop and search a car for no reason, and it is the doctrine that says police cannot kick down someone's door without a warrant showing why.

"The exclusionary rule protects the innocent as well as the guilty," says William Greenhalgh, a Georgetown University law professor who is writing a book about the subject. "It means the ordinary citizen walking down the street will not be annoyed, harassed or humiliated by police."

But critics argue that the truly innocent don't need protection, and answer the supporters' statistics and theories with specifics:

• Charges were dismissed last from a car was ruled inadmissible because the search warrant did not list the car's correct license plate.

• A convicted murderer was released from prison in Illinois — after confessing not once but twice — because police could not show they had enough reason to question him in the first place.

• On the same day last year that the Supreme Court said it was legal for police to search for drugs in a jacket on the floor of a car, it overturned a drug conviction because police had searched a package found in a car trunk.

Adding to the controversy, the exclusionary rule is often a major defense tactic in highly publicized criminal proceedings.

For instance, defense lawyers in the Atlanta child slayings case tried but failed to suppress evidence of fibers found in Wayne Williams' home on the grounds that police did not have probable cause to search for them.

And attorneys for John Hinckley Jr., accused in the attempted assassination of President Reagan, say they will try to exclude evidence from Hinckley's jailhouse diary because of his "reasonable expectation of privacy."

One of the proposed Senate bills, due for public hearings in Washington later this year, would abolish the exclusionary rule but allow people whose rights were violated to sue police for damages.

Anthony Amsterdam, a New York University law professor and highly regarded constitutional scholar, opposes this civil redress option for three reasons.

He says juries are rarely sympathetic to suits against police, people who have been illegally arrested are generally happy just to be set free and usually do not have the knowledge or the money to file a lawsuit.

The other Senate bill would exclude evidence only if the seizure were "intentional or substantial," which is similar to the presidential task force's recommendation that illegally obtained evidence be admitted if police acted "in good faith."

David Landau, an American Civil Liberties Union attorney, believes any congressional proposals to weaken the exclusionary rule will fail. He said that as part of the Constitution, it should take a full-fledged constitutional amendment — with approval by 38 states — rather than a simple law to change the rule.

The congressional proposals are similar to a new state law in Colorado which is still awaiting state and federal court tests.

Denver District Attorney Dale Tooley says the Colorado law, the only one of its kind in the nation, requires courts to admit illegally obtained evidence if police believed they were acting constitutionally and that belief was reasonable.

He says both the objective and subjective tests still protect the innocent, but prevent the guilty from escaping on a technicality.

"It's a more accurate search for truth, and you end up getting better justice," Tooley says.

But Greg Walta, Colorado's public defender, says the seven-month-old law encourages police to conduct illegal searches and seizures and then plead ignorance before judges who are under pressure from a crime-conscious public to admit evidence leading to convictions.

"It rewards careless police behavior. It rewards dishonest police behavior. Over the long haul, the honest citizen is going to be the loser," Walta says.

Historically, he says changes in the exclusionary rule or other judicial procedures have had little to do with the crime rate.

"I have not met one client nor has anyone else in this office met any clients who even knew the exclusionary rule had been changed on July 1," Walta says.

Many police officials say changes in the exclusionary rule would make no difference to them, either. "Cops aren't going to go up and down the street looking in houses or kicking down doors, no matter how the rule is changed," says Larry Layman, a Peoria, Ill., patrolman.

EDITORIAL PAGE

The Anchorage Times

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Legal loophole

NOT TOO MANY months ago the conviction of a man involved in a particularly awful rape and robbery case was reversed and he was set free.

The court held that his link to the crime had been discovered illegally. That link was a credit card belonging to the victim that was found in the man's wallet by a jailer.

The illegal aspect was that the man had been arrested on a traffic charge — not the rape. In the course of identifying his property before he was jailed, the stolen credit card was found. That represented, according to the courts, illegal evidence discovered through a search that was an infringement on the man's rights.

Alaskans were appalled and outraged.

The action by the court came in response to something in the law known as the "exclusionary rule."

This rule, which has been upheld by the U.S. Supreme Court, holds that evidence not legally obtained must be excluded from the case. In this particular instance, the man's conviction of rape was traced directly to the illegal discovery of the stolen credit card — and since that was improper, the whole conviction was improper, the judges said.

ONE OF THOSE outraged was Sen. Ed Dankworth, retired head of the Alaska State Troopers. T is week in Juneau he moved to do something about it.

"Far too many criminal defendants avoid the consequences of their actions based on technicalities," the Anchorage Republican said. And to remedy that, he introduced a bill that would permit introduction of illegally obtained evidence if the trial judge decides the defendant's rights were not substantially violated.

The rape case cited above would be one example where a person's rights were not substantially violated. No officer involved in that case was attempting to violate the man's rights. In fact, by taking an inventory of his possessions they were protecting him and themselves from any later charge that a piece of personal property might have been lost or stolen before the defendant was able to reclaim it after his discharge from jail.

One reads regularly about similar cases all over the country. Drugs uncovered in the trunk of a car stopped for a simple speeding arrest. Stolen goods found in a house when police enter to question a suspect about an unrelated incident. A murder gun found in the pocket of a person arrested for shoplifting. Those and more.

NO ONE SHOULD advocate a police-state mentality in the pursuit of those suspected of criminal activity.

But neither should criminals be turned free simply because of accidental or incidental discovery of evidence that by all common sense should be used against them.

In leaning over backward to protect the rights of the individual (a worthy and proper thing), the United States has let justice be denied by rigid adherence to the exclusionary rule.

Among the nations of the Western world, only the U.S. observes this rule. In Europe, the taking of illegal evidence indeed is punished — but the criminal does not escape.

There, the criminal goes to jail. And then the law enforcement officer who used illegal means to obtain the evidence likewise, in turn, pays a penalty for violating the law.

Sen. Dankworth's bill should be enacted by this legislature.

why should Rule 37 be
amended at all
ALL IT DOES IS AUTHORIZE A MOTION
TO SUPPRESS
all we need is to amend
the evidentiary rule

focus on a narrow range of case

why amend at all

by adding to Rule 412 the following
and
(3)

451/570
607/360

PART II

GEE and VANCE, Circuit Judges: ***

Many of the thirteen judges who join in this opinion [illegible]t disagree with that prepared by Ju[illegible]olitz for a different majority of the court; several formally concur in it. It is our view, however, that the drugs suppressed as evidence by the trial judge and by our panel should not have been and that to suppress them was wrong whether or not Williams' violation of a bond condition was such a crime as warranted her arrest and the consequent search of her person that revealed their presence.

The facts material to our view of this case are so simply stated that we reiterate them for the reader's convenience.[1] Special Agent Markonni, of the Drug Enforcement Administration, had previously arrested defendant Jo Ann Williams for running drugs. Pending her appeal from conviction of that offense, he knew that she was free on bond conditioned that she remain within the State of Ohio. While on duty at the Atlanta airport, he saw her deplane from an incoming, nonstop flight from Los Angeles. As she proceeded toward the departure gate for a flight to Kentucky on which she held a ticket, he arrested her for "bail jumping." A search pursuant to that arrest revealed that she was again running heroin.

Indicted for this second drug offense, committed while free on bail from the first, Williams moved to suppress the fruits of the search conducted pursuant to Markonni's arrest. The district court suppressed this evidence. On appeal from its ruling, a panel of our court affirmed. It reasoned that since violation of a bond condition was not a criminal offense such that a warrantless arrest could be made for it, both the arrest and the search pursuant to it were invalid. It therefore suppressed the heroin found as "fruit of the poisonous tree." In the panel's view, Agent Markonni's reasonable belief, held in an unquestioned good faith, that he was authorized to arrest Williams cut no figure in the analysis. Judge Charles Clark, dissenting, would have refused to apply the exclusionary rule in such circumstances. We took the case en banc to decide this question.

[9] Sitting en banc, we now hold that evidence is not to be su[illegible]sed under the exclusionary rule where [illegible]d by officers in the course of [illegible] are taken in good faith and [illegible]ible, though mistaken, belief [illegible] authorized. We do so beca[illegible]usionary rule exists to deter willf[illegible]flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high—in this instance the release on the public of a recidivist drug smuggler—with few or no offsetting benefits. We are persuaded that both reason and authority support this conclusion.

The "Good-Faith Exception"

Analytically, it matters little whether reasonable, good-faith police actions be viewed simply as beyond the reach of the rule or as constituting an exception to its application. Since numerous writers and judges have employed the latter formulation, we shall do so here. One commentator defines the "exception" as follows: "when an officer acts in the good faith belief that his conduct is constitutional and where he has a reasonable basis for that belief, the exclusionary rule will not operate." Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J.Crim.L. & Criminology 635, 635 (1978).

In fourth amendment cases, most good faith violations concern the failure to

*** Concurred in by Chief Judge Coleman and Judges Brown, Ainsworth, Charles Clark, Roney, Tjoflat, Hill, Fay, Garza, Reavley, and Sam D. Johnson.

1. Judge Politz' foregoing opinion, or that of the panel, 594 F.2d 86 (5th Cir. 1979), may be consulted for a more detailed account. No warrant is involved here, hence nothing that we say applies to factual situations where one has been obtained.

meet the requirement of probable cause. Two basic types of violation are possible. First, an officer may make a judgmental error concerning the existence of facts sufficient to constitute probable cause. Such cases may be characterized as examples of "*good faith mistake*." Second, an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled. In each of these cases, the officer may be deemed to have committed a "*technical violation*."

Id. at 638–39 (emphasis added and footnotes omitted). The Supreme Court and the circuit have all but explicitly adopted the technical-violation aspect of the good-faith exception, and each has rendered several decisions that implicitly at least support the good-faith aspect. As we discuss these opinions in detail below. Many writers have advocated the exception, among them Professor Charles Alan Wright, no minor authority on criminal procedure, who proposes modifying the rule so that "the criminal is to go free if the constable has flouted the fourth amendment but not if he has made an honest blunder."[2] Judge Henry Friendly has suggested limiting suppression to "the fruit of activity intentionally or flagrantly illegal."[3]

At least four current members of the United States Supreme Court have urged the adoption of a good-faith exception to the exclusionary rule." Ball, *supra* at 635. *E. g., Stone v. Powell*, 428 U.S. 465, 536, 96 S.Ct. 3037, 3073, 49 L.Ed.2d 1067 (1976) (White, J., dissenting);[4] *Brown v. Illinois*, 422 U.S. 590, 610–12, 95 S.Ct. 2254, 2265–66, 45 L.Ed.2d 416 (1975) (Powell, J., concurring). The Supreme Court itself in a long series of recent decisions, has restricted application of the rule so that it no longer if it ever was coextensive with the fourth amendment. *E. g., Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); *United States v. Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *Stone v. Powell, supra; United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). We think that reason plainly demands explicit recognition of a reasonable good-faith exception as well.[4a]

Justification for the Good-Faith Exception

[10, 11] The exclusionary rule, as now well-settled, is not itself a requirement of the Constitution. *E. g., Stone v. Powell*, *supra*, 428 U.S. at 482, 96 S.Ct. at 3046; *United States v. Calandra*, *supra* 414 U.S. at 348, 94 S.Ct. at 620. Rather, it is a judge-made rule crafted to enforce constitutional requirements, justified on the basis of its deterrence of

2. C. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 Tex.L.Rev. 736, 740 (1972).

3. H. Friendly, *Benchmarks*, 260–62 (1967).

4. Justice White stated:

> [T]he rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the *good-faith belief* that his conduct comported with existing law and *having reasonable grounds for this belief*. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed. (Emphasis added.)

4a. We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus, a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could never qualify.

future police misconduct.[5] The rule's application, moreover, must be considered in light of its direct effect of preventing the "whole truth" from being told and its by-products of freeing guilty criminals and endangering society.[6] Consequently, the rule is not applied in those contexts where it does not effectively deter official misconduct. *E. g., Stone v. Powell*, 428 U.S. at 486–87, 96 S.Ct. at 3048–49; *United States v. Calandra*, 414 U.S. at 348, 351–52, 94 S.Ct. at 620, 621–22; *United States v. Cruz*, 581 F.2d 535, 538 n.1 (5th Cir. 1978) (en banc). Such a context is that of technically improper police actions taken in a reasonable good faith, as is persuasively argued by Judge Clark in his dissent to the panel opinion:

> No proper deterrent effect is accomplished by the suppression of the evidence in this case. Field officers are seldom trained as legal technicians. Even those who are may have mistakenly thought that Officer Markonni's arrest was proper. Since the officer whose future actions are to be affected will not realize his actions are wrongful when he is compelled to make a quick decision in an apparently valid arrest situation which complicated legal analysis may later establish to be invalid, we cannot expect him to be deterred. If today's ruling does serve as any sort of deterrent, it may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. If he hesitates to act lest he later be criticized for denying to the process of justice evidence of crime, we have hindered, not furthered, the interests of justice. Unless an officer knows or should know his activities transgress the bounds of law, the evidence discovered by such activity ought not be suppressed.

United States v. Williams, 594 F.2d 86, 97–98 (5th Cir. 1979). It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was *legal* by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all. The Supreme Court recognized this in *Janis* in admitting evidence obtained in good faith under a warrant later found defective. "[T]he officers here were clearly acting in good faith, . . . a factor that the Court has recognized reduces significantly the potential deterrent effect of exclusion. See *Michigan v. Tucker*, 417 U.S., at 447 [94 S.Ct., at 2365]; *United States v. Peltier*, 422 U.S., at 539 [95 S.Ct., at 2318]." 428 U.S., at 459 n.35, 96 S.Ct., at 3034 n.35. Justice White as well has noted this lack of any deterrent effect:

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.

Stone v. Powell, 428 U.S. at 540, 96 S.Ct. at 3073–74 (White, J., dissenting). And again, Professor Wright has pithily observed that "a police officer will not be deterred from an illegal search if he does not know that it is illegal." Wright, *supra* at 740.

Any slight deterrent effect of excluding fruits of good-faith arrests is even less than the small deterrence from suppressing the fruits of illegal police actions that are attenuated in effect, that are challenged in habeas corpus petitions on fourth amendment grounds, that are used in grand jury

5. *E. g., Michigan v. DeFillippo*, 99 S.Ct. at 2633 n.3; *United States v. Cruz*, 581 F.2d 535, 538 n.1 (5th Cir. 1978) (en banc).

6. *E. g., Stone v. Powell*, 428 U.S. at 489–91, 96 S.Ct. at 3050–51; *Irvine v. California*, 347 U.S. 128, 136, 74 S.Ct. 381, 385, 98 L.Ed. 561 (1954), and especially *United States v. Lamas*, 608 F.2d 547, 550 (5th Cir. 1979).

deliberations, or that are used for impeachment. Yet the Supreme Court has found that the deterrent effect of exclusion in the examples listed and others does not justify the societal harm incurred by suppressing relevant and incriminating evidence. *United States v. Ceccolini*, 435 U.S. 368, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *Stone v. Powell, supra*; *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). The good-faith exception that we explicitly recognize today is of a kind with these.

Support in Authority for the Technical Violation Facet of the Good-Faith Exception

[2] The most common forms of "technical violations" made in good faith are arrests made in good-faith reliance on a statute that is later declared unconstitutional or, as here, on a reasonable interpretation of a statute that is later construed differently. Of course, the exception applies only if the police belief is both bona fide and reasonable. Suppression still results if officers allege a good-faith belief in a "law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws" or in a law that violated a "controlling precedent that [it] was unconstitutional." *Michigan v. DeFillippo*, 443 U.S. at 38, 99 S.Ct. at 2632.

In *DeFillippo* the Supreme Court admitted evidence seized in a good-faith arrest with probable cause (without a warrant) for violation of a law later declared unconstitutional. An officer arrested DeFillippo in good-faith reliance on such an ordinance, finding drugs in a search of DeFillippo's person made incident to the arrest. The Court ruled, in words that seem applicable to Officer Markonni's search of Williams' person and luggage:

> [T]here was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

Id. 99 S.Ct. at 2632. This decision was rendered after the instant panel decision, so the panel did not have the benefit of the Supreme Court's disposition of this closely analogous fact situation.

In *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), the Supreme Court admitted evidence seized in a good faith border search without a warrant under a statutory construction that was subsequently held unconstitutional. Border patrol agents made a warrantless search of Peltier's automobile, in reliance on a longstanding administrative definition, continuously approved judicially, of a reasonable distance from the border for such searches as 100 miles; and Peltier was convicted on evidence seized during that border search. The Supreme Court later overturned that definition of a reasonable distance. The Court refused to exclude the challenged evidence and refused to apply that subsequent decision retroactively: "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542, 95 S.Ct. at 2320.

In *United States v. Carden*, 529 F.2d 443 (5th Cir. 1976),[7] we sustained an arrest and search made in good faith under a statute later declared invalid. The Cardens were arrested and searched under an ordinance

7. *Cert. denied*, 429 U.S. 848, 97 S.Ct. 134, 50 L.Ed.2d 121 (1976), *modified on other grounds sub nom. United States v. Ashley*, 569 F.2d 975, 979 (5th Cir.), *cert. denied*, 439 U.S. 853, 99 S.Ct. 163, 58 L.Ed.2d 159 (1978).

against loitering, and a large bag of coins found in the search was used to convict them of robbing a government building. The ordinance was subsequently found unconstitutional, but the evidence derived from the good-faith search was not excluded.

> This Court has held more than once that an arrest made in good faith reliance on a statute not yet declared unconstitutional is valid regardless of the actual constitutionality of the ordinance. *Hamrick v. Wainwright*, 465 F.2d 940 (5 Cir. 1972); *United States v. Kilgen*, 445 F.2d 287 (5 Cir. 1971). *See also* . . . *Moffett v. Wainwright*, 512 F.2d 495, 502 n.6 (5 Cir. 1975). While appellants would be entitled to attack the constitutionality of any convictions under the Anniston ordinance, there is no bar to the use of evidence of other crimes obtained during [the arrest] for violation of a law which was valid when the arrest was made." 465 F.2d at 941–42.
>
> . . . [W]e have been reluctant to, and will not in this case, also require that [police officers] forecast future judicial decisions as to the constitutionality of the statutes under which they must make arrests. There is no evidence whatsoever in the record that the arresting officers did not believe that the Anniston loitering ordinance was constitutionally valid. No judicial decision existed, or now exists so far as we know, to negate that conclusion. Under such circumstances, we must reject the Cardens' attempt to assert the unconstitutionality of the ordinance to invalidate their arrest.

Id. at 445.

In *United States v. Kilgen*, 445 F.2d 287 (5th Cir. 1971), this circuit admitted evidence obtained in good faith under a similar statute. Kilgen was arrested and charged in good faith with violation of a vagrancy ordinance, and he consented to the officer's opening an automobile trunk where the officer saw numerous postage stamps and money orders. Kilgen confessed to the crime of stealing these things. We sustained admission of the confession because the police had arrested Kilgen in good faith, and hence exclusion would not deter any official misconduct, although the ordinance was later overturned.

> But overturning a [vagrancy] conviction due to an invalid statute does not automatically render the previous arrest and detention illegal absent some showing that police officials lacked a good-faith belief in the validity of the statute. . . . There is no hint of any abusive police conduct in effecting the arrest or in obtaining the evidence used at the trial for another crime. . . . In short, this is a clear case of police officers who, with the utmost regard for the rights of the defendant, carried out their sworn duty to make an arrest and obtain evidence under the law as it then existed. No legitimate interest would be served by excluding the confession to the separate crime of stealing postage stamps because we now find the vagrancy ordinance invalid.

Id. at 289. *See also United States v. Warren*, 578 F.2d 1058, 1077 n.17 (5th Cir. 1978) (en banc), *rehearing en banc granted*, 589 F.2d 254 (5th Cir. 1979) ("The validity of an arrest depends upon the reasonableness of the officers' actions at the time of the arrest and not upon what a court may glean from a statute three and a half years later. This rule is well established even where the statute under which the arrest was made is after declared unconstitutional.").

Support in Authority for the Good-Faith Mistake Facet of the Exclusionary Rule

[13] If Officer Markonni was mistaken in his belief that Williams' violation of her bond conditions authorized him to arrest her, as the trial court and our panel both held he was, his mistake was one made in a manifest good faith. Much authority also supports this facet of the exception that, we reiterate, requires a reasonable belief, as well as a good-faith belief, on the part of law enforcement officials.

In *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), the Supreme Court refused to exclude from a

federal tax proceeding evidence that had been obtained by state police in good-faith reliance on a search warrant later found defective. State police had seized wagering records and cash from Janis under a search warrant issued on allegations of bookmaking. A state court, finding the officer's affidavit that supported the warrant defective, suppressed that evidence. The Internal Revenue Service assessed Janis for excise taxes on wagering and levied on the seized cash. Janis filed a refund suit in district court and moved to suppress that evidence. The Supreme Court stated the issue and then resolved it as follows: "Is evidence seized by a state criminal law enforcement officer *in good faith*, but nonetheless unconstitutionally, inadmissible in a civil proceeding by or against the United States?" *Id.* at 434, 96 S.Ct. at 3023 (emphasis added).

[W]e conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule.

Id. at 454, 96 S.Ct. at 3032 (footnote omitted).

In *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Court declined to exclude the testimony of a witness located as the result of statements made by the accused during police interrogation administered "in complete good faith" but without proper *Miranda* warnings. The police questioned Tucker after his arrest for rape without giving full *Miranda* warning, and he voluntarily gave the alibi that he had been with Henderson. Henderson subsequently testified against Tucker, and Tucker moved to suppress his incriminatory statements on the ground that his identity was obtained in the improper interrogation. The Supreme Court admitted Henderson's testimony.

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Id. at 447, 94 S.Ct. at 2365.[8]

In *United States v. Hill*, 500 F.2d 315, 322 (5th Cir. 1974), *cert. denied*, 420 U.S. 931, 95 S.Ct. 1135, 43 L.Ed.2d 404 (1975), this circuit admitted evidence obtained in a search although the warrant was technically improper. The search warrant was issued upon an insufficient affidavit of a law enforcement agent, and the subsequent search of Hill's residence yielded heroin. We admitted the heroin and affirmed Hill's conviction because we allowed the affidavit to be bolstered by the sworn testimony of the agent before the magistrate.

[T]his situation furnishes no occasion to apply the exclusionary rule to bar the evidence of Hill's criminality that was obtained in executing the warrant. Phillips acted properly in going to the magistrate and seeking a warrant. Magistrate Sear acted properly in calling for additional information to demonstrate credibility. Thus, the only error attributable to the procedure they followed is a technical one that would in no way serve the deterrent purposes of the rule.

Id. at 322 (alternative ground).

In *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979), we refused to exclude evidence obtained through improper collabora-

8. Although the accused in *Tucker* had been questioned before *Miranda*, that does not distinguish the instant case, because *Miranda* has been held retroactive. *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). *See Michigan v. Tucker*, 417 U.S. at 447–48, 94 S.Ct. at 2365.

tion of federal and state agents. Pugh, a member of the United States Army, arranged a marijuana purchase from Wolffs at the suggestion of a county sheriff. An Army investigator and some sheriff's office personnel arrested Wolffs and his accomplices and seized the marijuana, thus violating the Posse Comitatus Act, 18 U.S.C. § 1385. The panel, recognizing the agents' good faith in that this was an isolated act, refused to apply the exclusionary rule.

> [A]ssuming without deciding that there was a violation, application of an exclusionary rule is not warranted. If this Court should be confronted in the future with widespread and repeated violations of the Posse Comitatus Act an exclusionary rule can be fashioned at that time.

594 F.2d at 85. *See also Leary v. United States*, 544 F.2d 1266, 1270–71 (5th Cir. 1977).

The recent decision of the Supreme Court in *Ybarra v. Illinois*, 444 U.S. 85, 96, n.11, 100 S.Ct. 338, 345 n.11, 62 L.Ed.2d 238 (1979), does not militate against the good-faith exception. The Court there held that a search of Ybarra and other patrons of a bar violated the fourth amendment because it was not authorized by a warrant to search the bartender and was not justified by probable cause to believe that Ybarra possessed heroin or a reasonable belief to anticipate that he was armed. Exclusion of evidence seized without any probable cause is an entirely different question from suppression of evidence seized upon a good-faith and reasonable belief in the existence of probable cause. The Supreme Court in *DeFillippo, supra*, while refusing to exclude evidence seized in good-faith reliance on a subsequently invalidated statute, noted that "the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes . . . which purported to authorize the searches in question without probable cause." 99 S.Ct. at 2633. And the Court in *Ybarra* distinguished *DeFillippo* on precisely this basis when it emphasized that the "statute purports instead to authorize the police in some circumstances to make searches and seizures without probable cause." 444 U.S. 96 n.11, 100 S.Ct. 345 n.11.

Application of the Good-Faith Exception to This Case

[14] Officer Markonni recognized with certainty that Williams was in violation of her bail limitations and that she was arriving from the very city from which she had obtained the heroin that caused her first conviction, rendered on a guilty plea. He acted in a good-faith belief that Williams' conduct violated 18 U.S.C. § 3146. This circuit at the time of the arrest had not ruled that a person violating bail requirements, but not a court appearance date, could or could not be arrested on that basis, and the only circuit that had inferentially done so had sustained the conviction.[9] Officer Markonni also acted under a reasonable, whether or not mistaken, belief and should not be charged with knowledge that a future panel decision would construe section 3146 to apply only to bond jumping that involved missing a court appearance. This case presents the questions both of a "good-faith mistake," an action under a reasonable factual error about an element of the crime defined in section 3146, and a good-faith technical violation, an action under a reasonable interpretation of the arrest power under section 3146 that was subsequently reconstrued by our panel. Williams is not on trial for bail jumping. Williams is on trial for possession of a large quantity of heroin. A good-faith mistake about the legal intricacies of bail jumping would not require exclusion of that heroin found in an incidental search.

Conclusion

[15] Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evi-

9. *United States v. Avery*, 447 F.2d 976 (4th Cir. 1971), *cert. denied*, 405 U.S. 930, 92 S.Ct. 984, 30 L.Ed.2d 804 (1972).

dence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence. Neither Markonni's good faith nor its reasonableness are questioned here, and a proper allocation of the burden of proof on this issue is therefore not squarely presented by the facts of this case. We therefore leave that matter to another day, going no further than to delineate the "exception" itself explicitly and to recognize that where the proponent establishes it, the evidence should be received if otherwise admissible.

Predictably, it will be argued that today's decision undercuts the fourth amendment. Not so; it concerns only the exclusionary rule, one device—but not the sole one—for enforcing the amendment, and a device that is already far from co-extensive with the amendment itself. As for the exclusionary rule, insofar as we restrict its application, we do so only to conform that to its underlying purpose: to deter unreasonable or bad-faith police conduct.

Where the reason for a rule ceases, the rule should also cease—a familiar maxim carrying special force here. For here the cost of applying the rule is one paid in coin minted from the very core of our factfinding process, the cost of holding trials at which the truth is deliberately and knowingly suppressed and witnesses, in contravention of their oaths, are forbidden to tell the whole truth and censured if they do. This is a high price indeed and one that ought never be paid where, in reason, no deterrence is called for and none can in fact be had. Such a continued wooden application of the rule beyond its proper ambit to situations that its purposes cannot serve bids fair to destroy the rule entirely in the long run. For the reasons we have stated, in addition to and independent of those given in Judge Politz' opinion, the decision of the district court excluding Williams' heroin and the panel opinion affirming it are

REVERSED.

JAMES C. HILL, Circuit Judge, with whom, FAY, Circuit Judge, joins, concurring specially:

I concur in the result reached in this case. I write briefly to explain why I agree with the approach proposed by Judges Gee and Vance.

Application of the Exclusionary Rule often requires us to set free the guilty because the constable, in good faith, blundered. In such cases, "[t]he temptation . . . becomes great to round off the edges of the Fourth Amendment to avoid the drastic result which obtains when the Exclusionary Rule is applied." *United States v. Lamas*, 608 F.2d 547, 550 (5th Cir. 1979). The good faith exception articulated by Judges Gee and Vance provides a sensible approach to the problem. It allows us to come to a just result without cutting away at the Fourth Amendment and, at the same time, without removing the deterrent effect of the Exclusionary Rule.

I am intrigued, but not persuaded, by the new approach urged upon us by Judge Rubin. He suggests that because a majority can resolve the issue before us (admissibility of the evidence *vel non*) by deciding the constitutionality of the search, we should not address the admissibility of the evidence on other grounds. I believe the order of address is the other way around. If we find the evidence admissible without regard to the constitutional question, we should decline to reach and decide the latter. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936).

My brother Rubin's scholarly exposition of possible rationales for the exclusionary rule other than deterrence carries with it the implication that, if there be no other reason, the opinion authored by Judges Gee and Vance is correct. While other possible bases have been proffered from time to time, *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 persuades me that they do not survive. Justice Brennan's eloquent dissent, quoted by Judge Rubin (p. 850), reveals that the issue of their

survival was clearly before the court. Were the rule grounded upon the necessity of avoiding "the taint of partnership in official lawlessness," it would exclude *all* evidence obtained in contravention of the Fourth Amendment. However,

> [d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Wong Sun v. United States* [371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441], *supra*; *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search. (414 U.S. at 348, 94 S.Ct. at 620)

The majority in *Calandra* says: "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect [illegible]." *Id.* at 348, 94 S.Ct. at 620. I accept that deterrence is its reason and its

We seek to deter violations of constitutional guarantees, not just to deter action of a law enforcement officer contrary to his or her deficient understanding of the law. This requires that law enforcement personnel acquaint themselves with those guarantees (by being deterred from persistent ignorance) and be disposed towards respecting them. This is the reason for making it clear that subjective good faith will not, by itself, suffice. Judge Rubin, in his footnote 4 (p. 850), suggests that the thrust of the opinion by Judges Gee and Vance might just as well reach evidence obtained in subjective good faith alone. That reads the opinion beyond its logic. That would reward ignorance. The rule we announce encourages learning.

ALVIN B. RUBIN, Circuit Judge, with whom GODBOLD, KRAVITCH, FRANK M. JOHNSON, Jr., POLITZ, HATCHETT, ANDERSON, RANDALL, TATE and THOMAS A. CLARK, Circuit Judges, join, specially concurring.

The twenty-four of us are rarely unanimous. However, none of us has expressed any doubt about the validity of the arrest of Jo Ann Williams and the resultant search of her person or the subsequent admissibility of the evidence thus found. Yet many of my brethren have seized the occasion to discuss what they consider an alternative ground for decision, but what is to me purely a hypothetical: whether the evidence would have been admissible had the search been unconstitutional. Judicial self-restraint should command us to defer until another day the discussion of issues that might have been material had the arrest been improper. Only in that event would it be necessary to consider whether evidence unconstitutionally taken must be suppressed. Only in that event would it even be appropriate for us to do so. I submit that those of my brethren who have joined in the separate opinion authored by Judges Gee and Vance and published as Part II, are "'reach[ing] out' for a vehicle to change a long line of precedent," *Crist v. Cline*, 434 U.S. 980, 981, 98 S.Ct. 603, 604, 54 L.Ed.2d 475 (1977) (Marshall, J., dissenting from order restoring case to calendar for oral argument), and that their doing so will have harmful results apart from the merit or lack of merit of their views.

In his dissent in *Bivens v. Six Unknown Named Agents of Federal Bureau of Nar-*

cotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), Chief Justice Burger traced the evolution, criticisms and weaknesses of the exclusionary rule.[1] No more complete critique can be desired. Yet, while the Chief Justice of the United States proposed some narrowing of the thrust of the rule, he said:

> I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed. . . . I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.

403 U.S. at 421-22, 91 S.Ct. at 2017, 29 L.Ed.2d 641.[2]

Legislation was at one time introduced to limit the application of the rule and to provide for damage actions against the United States. *See* S. 881, 93rd Cong., 1st Sess., 119 Cong.Rec. 4195 (1973). Further congressional attempts to deal with the issue may be anticipated.

It is needless to catalog the many decisions and the extensive literature in support of the exclusionary rule.[3] My brethren find that four justices of the Supreme Court have written in support of some modification of the rule. However, five members of the Court up to now have not suggested its qualification, and they constitute a majority. No other circuit court has altered the rule. Consideration of these factors should make us hesitate to rush in with our own newly devised judicial solutions. Those who join in the opinion authored by Judges Gee and Vance can cite no direct precedent for their conclusions save dissents and law review articles, many of which are polemic. They advocate modification of the exclusionary rule solely because, as applied, they think it ineffective to deter police misconduct and because they consider deterrence its exclusive purpose.

Deterrence is an important reason for the rule. However, even the decision in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), did not consider it the only basis of the rule. Justice Day's opinion relies on the duty of the courts to support the Constitution and to refuse to sanction practices destructive of rights secured by it. As the Supreme Court later observed:

> "[T]here is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

Mapp v. Ohio, 367 U.S. 643, 659, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081, 1092 (1961) (citation omitted).

Justice Brennan elaborated on this rationale for the rule in his dissent in *United States v. Calandra*, 414 U.S. 338, 357-58, 94 S.Ct. 613, 624-25, 38 L.Ed.2d 561, 576-77 (1971):

> The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the

1. The Chief Justice stated:

> Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals. See Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup.Ct.Rev. 1, 33 n. 172. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Ch.L.Rev. 665, 667 (1970).

403 U.S. at 416, 91 S.Ct. at 2014, 29 L.Ed.2d at 638.

2. In his concurring opinion in *Stone v. Powell*, 428 U.S. 465, 497, 96 S.Ct. 3037, 3053, 49 L.Ed.2d 1067 (1976), the Chief Justice said that the time had come to modify the reach of the rule "even if it is retained for a small and limited category of cases."

3. *See, e. g.*, Kamisar, *The Exclusionary Rule in Historical Perspective; The Struggle to Make the Fourth Amendment More Than 'An Empty Blessing,'* 62 Judicature 337 (1979), *cf.* 1 W. LaFave, Search and Seizure § 1.2 (1978).

people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.

That these considerations, not the rule's possible deterrent effect, were uppermost in the minds of the framers of the rule clearly emerges from the decision which fashioned it:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
>
> . . . . . .
>
> This protection is equally extended to the action of the government and officers of the law acting under it. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks v. United States*, 232 U.S. 383, 391–392, 394, 34 S.Ct. 341, 344, 345, 58 L.Ed. 652 (1914).

The rule has also been justified, notably by the late Justice Hugo Black, on the basis that the relationship between the fourth amendment and the self-incrimination clause of the fifth amendment requires suppression. *See Mapp v. Ohio*, 367 U.S. 643, 661–666, 81 S.Ct. 1684, 1694–1698, 6 L.Ed.2d 1081, 1093–96 (1961) (concurring opinion). *See also Wolf v. Colorado*, 338 U.S. 25, 41–42, 48, 69 S.Ct. 1359, 1368–69, 93 L.Ed. 1782, 1793 (1949) (Rutledge, J., dissenting).

Whether or not the rule should be modified, these opinions warrant the full and direct consideration they have not received in Part II. The announcement of a radical change in the scope of the exclusionary rule creates a host of interpretative problems.[4] Its application presumably will require re-

4. Part II does not make clear the scope of the shield of either good faith or of reasonableness. It raises many questions. For example, does the reasonable-good-faith doctrine permit introduction of evidence taken under an invalid search warrant because the policeman reasonably believed it to be valid? Does it shield only errors of fact or both errors of fact and errors of law?

While I do not consider this a proper occasion for discussion of the merits of the exclusionary rule either in general or as applied to this case, I must point out that the solution advocated by my brethren in Part II raises questions that warrant debate. When we are confronted with a case whose resolution truly turns on the exclusionary rule, I would consider all of the Supreme Court precedents. If they allowed us, as judges of an inferior court, sufficient latitude, I would consider all of the arguments for and against the rule and not merely its potential for deterring police misconduct. On that occasion, I would examine more closely the logic of the remedy proposed in Part II. My brethren reason that the exclusionary rule is "justified in the illegal search context only by its deterrence of future police misconduct." P. 841 *supra*. They say, "It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was *legal* by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all. . . . [A] 'police officer will not be deterred from an illegal search if he does not know that it is illegal.'" P. 842 *supra*.

If this is correct, it appears needless to require the police officer's subjective good faith also be objectively reasonable. A policeman who is in complete subjective good faith is unlikely to stop to ask himself, "Am I also reasonable?" The additional criterion that the mistaken belief that the officer is acting correctly must also be reasonable suggests uneasiness with the reliability of a good faith test. It cannot be justified on the unsupported supposition that if the police know good faith alone will not suffice they will also be encouraged to learn constitutional law and deterred from acting in either ignorance or unreasonableness.

trial of almost every motion to suppress in every criminal case now pending before us on appeal and in many cases now pending in district courts. In many trials, motions to suppress will be denied, defendants will be convicted, their convictions will be appealed and there will be no finality until the Supreme Court decides. The announcement of the rule as an alternative ground for decision in a case where all the court agrees on the result virtually immunizes this case from Supreme Court review. We must, therefore, await another case where the issue is directly raised and decide the question again before there can be reasonable hope that the Supreme Court will review what we do. I must, therefore, express my regret that this case has been utilized as a vehicle to disseminate a doctrine unnecessary to its decision. The merit or lack of merit of action that is so gratuitous need not at this time be further discussed.



COOK INDUSTRIES, INC., Plaintiff-Appellant Cross-Appellee,

v.

BARGE UM-308, her tackle, apparel, etc., in rem, Defendant,

Upper Mississippi Towing Corporation, in personam, Defendant-Appellee Cross-Appellant.

No. 78-2797.

United States Court of Appeals, Fifth Circuit.

July 31, 1980.

Shipper sued carrier for injury to a cargo of soybeans aboard the carrier's vessel. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., found the carrier liable for the cargo damage but awarded no damages, finding that the shipper had presented insufficient evidence of damage. Carrier and shipper appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) the district court's findings that the carrier breached its duty to inspect the cargo of soybeans during a 74-day delay in shipping and that its negligent failure to inspect the soybeans resulted in their deterioration were not clearly erroneous, and (2) the proper measure of damages where the shipper blended the deteriorated beans with a higher grade of soybeans and sold the blend at a price equal to the original market value of the cargo was not the cost of blending the deteriorated soybeans with the higher grade beans, but was the usual measure of damages, the difference between the fair market value of the cargo at the place of destination, in like condition as when it was shipped, and its actual value at the place of destination.

Affirmed in part, reversed in part and remanded.

1. Shipping ⇐131

Usual measure of damages for injury to goods in possession of carrier is difference between fair market value of cargo at place of destination, in like condition as when it was shipped, and its actual value at place of destination.

2. Shipping ⇐132(5)

In action by shipper against carrier for injury to cargo of soybeans aboard carrier's vessel, district court's findings that carrier had duty to inspect cargo during 74-day delay in shipping and that its failure to do so caused deterioration of soybeans were not clearly erroneous.

3. Shipping ⇐120

Common carrier is under continuing duty to protect shipper's cargo against damage while cargo remains in carrier's custody, including obligation to inspect cargo

Bill would water down state exclusionary rule

HB75

Times Juneau Bureau

Juneau — A bill that would let some evidence that was obtained illegally be used against suspects of major crimes has been introduced by Rep. Sam Pestinger, R-Anchorage.

The proposal would weaken the so-called exclusionary rule. Under the rule, evidence obtained illegally — when police violate a suspect's constitutional rights — cannot be used in court against the person.

Law-and-order advocates see the exclusionary rule as a legal technicality that can thwart police investigations, hamper prosecution strategy and sometimes free criminals who ought to be punished.

Pestinger said he is not seeking a sweeping revision of the exclusionary rule.

"What I'd like to see is that a search based upon a warrant that contains a technical defect in the warrant, and the officer is acting in good faith on the warrant. We want that evidence to be introduced."

"We do have some basic civil rights here that we have to protect," he said. But evidence should not be withheld if a warrant lists the wrong color of a house to be searched and the rest of the case is valid, he said.

The exclusionary rule was established by a series of legal precedents, based on the constitutional prohibition of illegal searches and seizures.

The Court found his statements concerning the bribe admissible although given after a request for counsel since they constituted an independent crime, declaring that "legal assistance does not give immunity for a new crime committed in the presence of police officers." Here, the bribe offer furnished a valid, independent basis for interrogation where defendant took the risk that his offer would be recorded.

A defendant who asks for counsel in one breath and in the next, without awaiting the arrival of counsel and in the absence of provocation, makes a bribe offer, shows that he views the need for legal assistance as limited to "legal proceedings that will ensue but considers himself quite competent to seek an illegal end to his predicament."

In denying suppression of the cocaine, the Court found defendant's conduct both uncoerced and so bizarre ($10,000 bribe for a traffic offense) that a police officer offered such a bribe would quite naturally ask questions. No unfairness occurs in creating a further exception to the waiver of counsel rule only in the presence of counsel when a defendant attempts to subvert justice. Defendant's admissions were spontaneous in response to legitimate police inquiry, and, since they were related to his bribe offer, fell outside the protection of his right to counsel.

Defendant's admissions on possessing cocaine furnished probable cause for arrest. Not only was it seized after arrest but the information as to its location given as part of the bribe attempt, precluded any reasonable expectations of privacy.

In a dissent by Judge Jasen, a three-judge minority found admission of the cocaine offensive to the right to counsel. The dissent felt that the police are not relieved of their constitutional obligations to respect a defendant's request for counsel simply because during the course of prosecution, defendant commits another independent crime.

Search Warrant—Canine Reaction to Aroma of Contraband—Reliability of Dog's Senses

(N.Y. Ct. of App.-12/22/81)

Suspicions of police at the Los Angeles airport were aroused by the profuse sweating and nervous behavior of defendants who displayed large sums of cash when they purchased tickets without reservations. A specially trained dog, Frog, was brought over to the baggage area and gave positive reactions, indicating the presence of drugs. Defendants were allowed to board the plane. State police in Buffalo, after securing a search warrant based upon these facts, found a substantial quantity of heroin in one of the defendant's suitcases.

The Court in *People* v. *Price* held that no warrant was required for Frog's initial activity, namely sniffing the air to determine if contraband was present in their luggage. Since there was no actual intrusion or search of the luggage, the defendant, who moved to suppress the seizure of the heroin on Fourth Amendment grounds, could not establish the clearly illogical proposition that he had a reasonable expectation "that the air surrounding his luggage and the odor apparent in that surrounding air will remain private."

Frog's 100% prior accuracy in over 700 drug detection cases and judicial notice of mankind's longtime use of the superior senses of dogs, precluded production of the "canine cannabis connoisseur" for in-court examination in the absence of any challenge to the dog's reliability.

Cool example of exclusionary rule problem

Arrest Based on Erroneous Warrant Information—No Probable Cause

(N.Y. Ct. of App.-12/23/81)

A unanimous Court in *People* v. *Jennings* reversed defendant's burglary convictions based on its finding that his arrest as a parole violator and the subsequent search and seizure of stolen items and defendant's palmprint incident to that arrest were not based on probable cause since the warrant relied on by the arresting officer had been vacated. A warrant for defendant's arrest was issued in November 1977 by the State Division of Parole and entered in the computerized records maintained by the Division of Criminal Justice Services ("DCJS") and the Federal Bureau of Investigation's National Crime Information Center. The warrant was executed in January 1978 and a clearance form was filed with DCJS soon thereafter. A Supreme Court order vacated the parole violation warrant in June 1978. However, the warrant was maintained on DCJS files as an active violation warrant.

In September 1978 defendant's car was stopped for various traffic violations. In the course of writing tickets, the officer forwarded identifying information on defendant to local police headquarters for a standard warrant check with DCJS and the FBI via teletype. Within minutes the open warrant was reported back to headquarters which attempted, by teletype, to confirm the status of the warrant with the Division of Parole. Parole did not respond to the inquiry. Based on the open warrant, the officer arrested and searched defendant, discovering stolen jewelry on his person and other stolen goods in the trunk of the automobile. During processing at headquarters defendant's palmprint was taken and later matched with a print from a burglarized house. Defendant subsequently admitted that burglary.

In reversing defendant's conviction on the basis of his invalid arrest, the Court suppressed the items taken from his person and the trunk of the automobile as well as his palmprint and admission as "poisoned fruits" of the unlawful arrest. The Court rejected the prosecution's claim that the arresting officer's good faith reliance on the warrant information rendered the exclusionary rule inapplicable since "[a]n assessment of probable cause turns on what was reasonably and objectively in the mind of law enforcement authorities" and not subjective considerations such as absence of malice or lack of intent to violate constitutional rights. The Court also rejected the People's argument of inevitable discovery after an inventory search because the arresting officer had conceded that until he learned of the warrant he was only going to ticket defendant for the traffic violations.

The United States LAW WEEK

A NATIONAL SURVEY OF CURRENT LAW

September 22, 1981 • THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C. • Volume 50, No. 11

SUMMARY AND ANALYSIS

Iowa Bar Can't Stop Lawyers From Direct Mail Advertising

The Iowa bar association cannot completely prohibit direct mail advertising by attorneys, nor can it prevent them from advertising their fees as "reasonable" or "moderate," the U.S. District Court for the Southern District of Iowa rules. It declares several Iowa disciplinary rules prohibiting such activities incompatible with the First Amendment. (Bishop v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association, 8/20/81).

In response to the approval of lawyer advertising in Bates v. State Bar of Arizona, 433 U.S. 350, 45 LW 4895 (1977), the Iowa bar adopted rules prohibiting all forms of advertising not specifically listed. The list did not include direct mail advertising. In addition, the rules spelled out certain prohibitions, including any "subjective" characterization of fees as "cut-rate," "lowest," or "reasonable."

The court employs the test embodied in Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557, 48 LW 4783 (1980), for determining the constitutional limits on commercial speech regulations. It concludes that while the state may have legitimate interests in regulating direct mail advertising, total prohibition is more extensive than necessary to serve those interests. Moreover, the court notes, direct mail advertising has received constitutional clearance in both Kentucky and New York.

As to the subjective characterization rule, the court approves the ban on "hucksterish" adjectives such as "cut-rate" and "give-away," but, it says, the First Amendment protects the "verifiable truthful use of restrained adjectives" such as "reasonable," "very reasonable," and "moderate." (Page 2161)

Ky. Court Refuses To Suppress Drugs In Light Of Police Officers' Good Faith

The Kentucky Court of Appeals refuses to order the suppression of drugs whose seizure, while perhaps technically illegal, was accomplished by officers who acted reasonably and in complete good faith. The court does not adopt a specific "good faith" exception to the exclusionary rule, as the Fifth Circuit appears to have done in U.S. v. Williams, 622 F2d 830, 49 LW 2161 (1980). But it does quote extensively from that case. Also cited is People v. Adams, 442 NE2d 537, 49 LW 2736 (1981), in which the New York Court of Appeals took a "good faith" approach to consent searches. (Richmond v. Commonwealth, 7/31/81, received 9/10/81)

The evidence in this case was seized pursuant to a warrant issued by a magistrate from another jurisdiction. The court doubts that such a warrant is legal, but it finds no controlling decisions on the matter and refuses to resolve the issue here. Instead it concludes that, regardless of the warrant's lawfulness, the fruits of the search should not be suppressed because neither the police nor the issuing magistrate had any reason to believe they were acting illegally.

"We simply hold here," the court says, "limited to the facts of this case, that the application of the exclusionary rule, even if the search warrant was illegal, would do nothing to deter future police conduct taken in the reasonable and good faith belief that the conduct was legal." (Page 2162)

Employer Must Prove Equal Pay Act Defense In Sex Bias Suit Under Title VII

In a suit under Title VII of the 1964 Civil Rights Act alleging pay differentials based on sex, the female plaintiff, of course, must persuade the trier of fact that females are paid less than males for doing the same work. But, the U.S. District Court for the Eastern District of California decides, once the plaintiff establishes that fact, the employer has the burden of proving, not just proffering evidence, that the pay differential is authorized by one of the four affirmative defenses contained in the Equal Pay Act. That's different, the court carefully explains, from Title VII litigation not involving sex-based pay differentials where the burden of persuasion always remains with the plaintiff. (Kouba v. Allstate Insurance Co., 9/3/81)

A female insurance sales trainee alleged that her employer discriminated against females by setting

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and the dispatcher's radio calls to the police cars were affirmative actions setting the emergency machinery in motion."

Although there is no direct evidence that the victim detrimentally relied on the assurance of police assistance, the court finds circumstantial evidence that "strongly suggests that she did so. She could have summoned help from police in the village where she lived or from her neighbors and she could have left her house, but instead she remained inside. (Page 2182)

Costs Outweigh Benefits

EXCLUSIONARY RULE COMES UNDER FIRE IN WASHINGTON STATE

In a case that reflects the current ferment over the Fourth Amendment exclusionary rule, a majority of the Washington Supreme Court refuses to apply the rule to official actions that violated not the Constitution or Washington law but a neighboring state's law. Police officers from Washington arrested the defendant in Oregon and brought him back into their own jurisdiction, offending several Oregon statutes in the process. The defendant challenged the admission of a confession he subsequently gave as the fruit of the poisonous tree. Noting that this is a case of first impression in Washington, the majority employs a balancing test and determines that the exclusionary rule is not applicable to cases such as this one. (State v. Bonds, 11/10/82)

While the U.S. Supreme Court has seemingly limited the justifications for the exclusionary rule to deterrence only, the Washington majority takes a more expansive view, noting that the goals of the rule also include preservation of the judiciary's dignity and, "most important," protection of privacy interests. Even so, the costs of applying the rule in this case outweigh its benefits, the majority says. The arresting officers had probable cause to arrest the defendant and "fell short only of the Oregon rule that a private citizen may not arrest for a felony committed out of his presence. This rule goes beyond what we consider necessary to protect the privacy interests of individuals." Furthermore, there are plenty of deterrents for future misconduct of this kind — the officers could face criminal charges, state civil actions, and federal civil rights suits. In addition, judicial integrity would not be endangered by admission of the confession.

The exclusion of the defendant's confession would undercut the state's entire case against the defendant, "whose guilt is not questioned," the majority adds. The "improper" return of the defendant "was merely incidental to the arrest and represented no new intrusion into defendant's privacy. It represented more of an affront to the rights of the State of Oregon than of the defendant."

The majority warns, however, that it will use its supervisory power to exclude evidence obtained as a result of future unauthorized violations, if potential liability does not deter such conduct.

Justice Utter dissents on the ground that the rendition of the defendant into Washington, absent a judicial finding of probable cause, violated the Fourth Amendment. The arrest and rendition violated Washington as well as Oregon law, he adds. (Page 2183)

Legislation — The exclusionary rule is also undergoing close scrutiny in another arena — Congress. The House Judiciary Subcommittee, conducting a series of hearings into the operation of the rule, recently addressed the question of whether the rule should be qualified with a "good faith" exception. However, all three witnesses who testified at the hearing gave the idea very negative reviews.

The first witness, a law professor, focused his opening remarks on the possible implications of the Supreme Court's recent order of reargument in Illinois v. Gates (see 32 CrL 1033). He opined that the Court might be prepared to adopt a limited version of the good-faith exception in that case but expressed the view that such a course would stop the development of Fourth Amendment law.

This sentiment was echoed by the second witness, who represented an organization of police executives. She said the good-faith exception had little merit and in its place proposed a scheme whereby responsibility for unconstitutional police behavior would be placed on police adminstrators and not on individual officers. Under this system, if the prosecution showed that a police department met certain training and recording requirements the challenged evidence would be admitted.

The final witness appeared on behalf of the Philadelphia Bar Association and voiced that Bar's disagreement with any major change in the exclusionary rule. Change would require years of settled case law to be discarded and would be a waste of judicial resources, he said. The witness also told the subcommittee that it may not have authority to change the rule. (Page 2197)

Comprehensive Review

LEGALITY OF ABORTION RESTRICTIONS ARGUED BEFORE U.S. SUPREME COURT

For the first time since the U.S. Supreme Court's ruling in Roe v. Wade, 410 U.S. 113 (1973), which most observers believe announced an unfettered right to abortion during the first three months of pregnancy, the Court is conducting a comprehensive review of state and local restrictions on abortion. The Court heard oral argument last week in cases that could refine the "compelling" state inter-

Riss. They distinguish Schuster v. City of New York, 5 NY2d 75, where the special relationship giving rise to liability was found in the obligation owed by the municipality to an informer who, at the risk of his life, had given information to the police.

The defendant's argument misses the mark. It is not the establishment of the emergency call system to serve the Village of Kenmore, standing alone, which creates the duty. It is the holding out of the 911 number as one to be called by someone in need of assistance, Amalia DeLong's placing of the call in reliance on that holding out, and her further reliance on the response to her plea for immediate help: "Okay, right away." This is not a mere failure to furnish police protection owed to the public generally but a case where the municipality has assumed a duty to a particular person which it must perform "in a nonnegligent manner, [although without the] voluntary assumption of that duty, none would have otherwise existed" (Florence v. Goldberg, 44 NY2d 189, 196). The complaint writer's acceptance of the call, his transmittal of the complaint card to the dispatcher and the dispatcher's radio calls to the police cars were affirmative actions setting the emergency machinery in motion. This voluntary assumption of a duty to act carried with it the obligation to act with reasonable care * * *. [*End Text*]

But, the city and county argue, failing to fulfill an undertaking to provide police protection does not result in liability unless it be shown that the police conduct in some way increased the risk. They maintain that the evidence does not establish that the conduct had gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury. In other words, they argue, although the hand may have been set to the task and withdrawn, it has resulted in no harm. We disagree.

[*Text*] While there could in this case be no direct evidence that Amalia DeLong relied to her ultimate detriment on the assurance of police assistance, the circumstantial evidence strongly suggests that she did so. Instead of summoning help from the Village police or from her neighbors * * *, she waited for the response to her 911 call. Instead of taking her baby and going out the front door where she would have been safe, she remained defenseless in the house. [*End Text*]

Nor can we agree that the proof was insufficient to establish proximate cause. Where different inferences may reasonably be drawn from the evidence, the question is one for the jury. Here, the jury could have concluded that, without the critical mistakes in handling the initial transmission and the subsequent failure to conduct a follow-up, a village police car would have arrived in time to prevent the attack or to stop the intruder before he could inflict the final fatal wound to the neck. — Hancock, J.

(DeLong v. County of Erie, NY SupCt, AppDiv, 4thDept, 11/9/82)

WASHINGTON BALANCES COSTS, BENEFITS OF EXCLUSIONARY RULE

Confession resulting from illegal arrest in neighboring state is admissible. ▸*20,520* ▸*10,55* ▸*30,15* ▸*100,753*

In a case of first impression in that state, a majority of the Washington Supreme Court declines to apply the exclusionary rule to the confession of a murder defendant whose arrest in Oregon by police officers from Washington violated Oregon law. The illegality of the arrest and return of the defendant to Washington falls short of a constitutional violation; it violated only the laws of a neighboring state, the court says. Such circumstances justify application of a balancing test to determine if the benefits of applying the exclusionary rule outweigh the costs of its application.

In this case, the cost of applying the rule is substantial, the majority declares; the state's case would be undermined. On the other hand, the protection of privacy interests of individuals, deterrence of police misconduct, and preservation of the judiciary's dignity would not be significantly endangered by the failure to apply the rule.

The majority also refuses to suppress the trial testimony of a psychiatrist who had been appointed to assist defense counsel at an earlier juvenile court jurisdictional hearing, but testified for the state, in rebuttal, at the trial itself. When the defendant raises the insanity defense, the majority says, statements uttered in the context of a psychiatric examination are not protected by the Fifth Amendment, and the attorney-client privilege does not cover the psychiatrist's testimony.

Justice Utter, dissenting, maintains that the rendition of the defendant into Washington, without a judicial finding of probable cause, violated the Fourth Amendment. Furthermore, the arrest and rendition violated both Oregon and Washington law, he says. He concurs with the majority's ruling that the psychiatrist's testimony was admissible, but disagrees with the majority's conclusion that the attorney-client privilege should not extend to a psychiatrist's testimony when the insanity issue is raised by the defense. (State v. Bonds, 11/10/82)

Digest of Opinion. Defendant Dudley Mark Bonds lived in Vancouver, Washington. Bonds was 16 years old when, on the evening of November 14, 1978, he raped and murdered an elderly woman in her home. On November 21, two detectives from the Vancouver Police Department, acting on information that Bonds was employed by a Portland, Oregon, restaurant, went to the restaurant and then to a nearby shopping mall, where they located Bonds.

After Bonds confirmed his identity, he was told that he had been reported by his father as a runaway and that the officers wanted him to return with them to Vancouver. The detectives did not tell Bonds that he was a suspect in a homicide and burglary, that he was being arrested for these crimes, or that they intended to interrogate him regarding these crimes upon returning him to the Vancouver police station. Defendant asked the officers what would happen if he refused to return with them to Vancouver. They said he would be turned over to the Multnomah County, Oregon, juvenile authorities, who would detain him in their custody. Defendant then told the detectives that he would return with them to Vancouver.

As the detectives accompanied defendant from the shopping mall to their vehicle, they told him not to run from them, and one of the officers took him by the upper arm and led him to the car. The detectives then drove defendant to the Vancouver police station. They did not explain to him that he had a right to contest in an Oregon court his return to the state of Washington. The officers had no warrant for defendant's arrest and no attempt had been made to obtain a warrant.

At the police station, Bonds was read his Miranda rights and subsequently confessed. Bonds was charged with five felonies arising out of the events which culminated in the victim's death. A "juvenile decline hearing" was held to determine whether Bonds would be tried as an adult. To assist defense counsel in preparation for this hearing, the court ordered the appointment of Dr. Guy Parvaresh, a psychiatrist, and Dr. Dean Harris, a psychologist. At this time, Dr. Parvaresh interviewed Bonds and elicited incriminating statements from him. The juvenile court heard testimony and argument and declined jurisdiction. Bonds was remanded to Clark County Superior Court, where he was charged with first degree murder, first degree rape, and first degree burglary. He pleaded not guilty and not guilty by reason of insanity.

Prior to trial, hearing was held to determine the admissibility of Bonds' confession and other evidence obtained subsequent to his arrest in Portland. The evidence was ruled admissible. Also prior to trial, Bonds moved in limine against the state's using Dr. Parvaresh as a rebuttal witness; the motion was denied.

At trial, defendant presented an insanity defense. The jury convicted Bonds of first degree murder, first degree rape, and first degree burglary. He appealed to the court of appeals, and we accepted certification.

The Vancouver police officers violated Oregon law in arresting Bonds and removing him to Washington. First, Oregon statutes were violated by the arrest. The police officers were not Oregon peace officers (ORS 133.005(3)), or persons authorized by Oregon law to take juveniles into custody (ORS 419.569(1)). For purposes of Oregon law, they were only private citizens and could arrest only for offenses committed in their presence (ORS 133.225). The arrest of Bonds was not for an offense committed in their presence and therefore violated Oregon statutes. Second, the officers made no attempt to comply with Oregon extradition procedures, under the Interstate Compacts on Juveniles and Children, Juvenile Services (ORS 417), and the Uniform Criminal Extradition Act, (ORS 133.743-133.992).

It is not disputed that the officers had probable cause to arrest Bonds. Therefore, although no warrant for his arrest had been obtained, the arrest met the standards of reasonableness prescribed by the Fourth Amendment. There is therefore no Fourth Amendment violation to require or justify the exclusion of Bonds' confession.

In this state, we have not limited the exclusionary rule to protection of the constitutional immunity from unreasonable search and seizure. Instead, we have extended the rule beyond the original Fourth Amendment context to suppress evidence obtained pursuant to an unlawful misdemeanor arrest. The rule has also been applied when a statute is violated in the course of obtaining evidence.

[*Text*] We have not, however, previously had the opportunity to consider the application of the exclusionary rule where the arresting officers violate, not statutes of this state, but statutes of a neighboring state. Arguably, such an arrest is illegal and therefore justifies the application of the exclusionary rule without further discussion. * * * However, we decline to mechanically apply the exclusionary rule in this case without considering whether the benefits to be obtained from its application outweigh the costs imposed.

By balancing the competing costs and benefits in this case, we do not intend to suggest that such a balancing should be carried out whenever the operation of the exclusionary rule is an issue. When evidence is obtained in violation of the defendant's constitutional immunity from unreasonable searches and seizures, there is no need to balance the particular circumstances and interests involved. * * * Evidence obtained as a result of an unreasonable search or seizure must be suppressed. However, where evidence is obtained through an illegality which falls short of a violation of the defendant's constitutional immunity, and where no violation of this state's laws has occurred, we hold that balancing of the costs and benefits of exclusion is appropriate. See Stone v. Powell, 428 U.S. 465, 488 (1976). The illegally obtained evidence should be suppressed unless the costs of suppression in the particular case outweigh the benefits achieved by suppression. * * *

[T]he exclusionary rule should be applied to achieve three objectives: first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions, second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means. We now proceed to consider the extent to which these objectives would be attained by excluding the confession in the present case.

The privacy interests of individuals against unreasonable intrusions are protected in this state by the requirement that to be constitutionally valid an arrest must be reasonable. * * * In the present case, the police officers who arrested defendant had probable cause to believe he had committed a felony in Washington. The officers fell short only of the Oregon rule that a private citizen may not arrest for a felony committed out of his presence. This rule goes beyond what we consider necessary to protect the privacy interests of individuals. Its violation therefore does not represent the kind of intrusion that the exclusionary rule is designed to prevent. Application of the rule in this case would therefore not advance the primary purpose which underlies the rule.

However, the second and third purposes of the rule might be served by application of the rule in this case. Unauthorized police excursions into neighboring states would certainly be deterred by a refusal to admit evidence obtained as a result of such activities. However, we feel that in this case alternative deterrents are available. The police officers concede that they were acting as private citizens in Oregon and therefore may well be exposed to civilian criminal or civil liability for unlawful arrest under Oregon law. Even police officers may suffer civil liability if the civil rights of the arrested person were violated. * * * If such potential liability does not constitute sufficient deterrence of police officers' making unauthorized excursions into another jurisdiction, let it be understood that we will not hesitate in the future to use our supervisory power to exclude the fruits of such unauthorized excursions. * * *

The final purpose of the rule, preservation of judicial integrity, would also be served by the application of the rule. However, this consideration is not absolute * * * and in this case is mitigated somewhat by the arrest being consistent with standards recognized by this court.

We turn now to consider the costs of applying the rule. These are substantial. Defendant's confession was crucial to the State's case against him. It implicated him in three terrible crimes. It is not claimed that the illegality impaired the credibility of the confession. Suppression would threaten the State's entire case against defendant, whose guilt is not questioned. We have little hesitation in concluding that these costs clearly outweigh the limited benefits which would be obtained from excluding the confession because of the illegal arrest.

The second phase of the police officer's illegal conduct was the return of defendant to Washington. The officers cavalierly ignored Oregon extradition proceedings and summarily removed defendant across the Columbia River into Washington. However, such illegality does not constitute a violation of due process * * * Nor, in our opinion, does it constitute reason for the operation of the exclusionary rule. The summary removal of defendant into Washington took only a few minutes and was accomplished peacefully, without threats and with defendant's concurrence. The improper interstate rendition was merely incidental to the arrest and represented no new intrusion into defendant's privacy. It represented more of an affront to the rights of the State of Oregon than of the defendant. Accordingly, we conclude that the fact that the arrest was followed by a violation of Oregon extradition procedures does not shift the balance of costs and benefits which we have already discussed. We therefore affirm the trial court's refusal to suppress defendant's confession.

We do not, by admitting defendant's confession, in any way condone the extraterritorial activities of the police officers in this case. * * * Although the blatant violation of Oregon laws did not warrant exclusion of the evidence in this case, we reiterate our determination to exercise our supervisory powers to exclude evidence for such violations in the future. [*End Text*]

Bonds argues that the attorney-client privilege precluded Dr. Parvaresh from testifying against him. He also argues that his Fifth Amendment privilege against self-incrimination was violated by the testimony of Dr. Parvaresh. Although Bonds contends that the two privileges are intertwined, we find that a rational resolution of the issue can be achieved only by disentangling them.

The Supreme Court recognizes that statements uttered in the context of a psychiatric examination are removed from the reach of the Fifth Amendment when the defendant raises the insanity defense. See Estelle v. Smith, 451 U.S. 454, 29 Crl.

3031 (1981). We hold that Dr. Parvaresh's testimony was not protected by the Fifth Amendment.

[Text] A complete and convincing discussion of why full disclosure outweighs the benefits of the privilege is made in Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists, 66 Va. L. Rev. 597, 635-42 (1980). Briefly, Saltzburg argues that the defense psychiatrist's examination of defendant is likely to be more accurate on the issue of insanity than that of the prosecution's. The defense psychiatrist will generally examine defendant earlier than the prosecution. The examination will thus be closer to the time of the offense, when defendant's recollections are clearer and there is less likelihood that defendant's mental condition has changed. Moreover, a defendant might benefit by undergoing several psychiatric examinations, examining reports of psychiatrists unfavorable to his insanity defense, and tailoring his response in subsequent examinations more favorably to his defense. Defendant is also likely to be more cooperative with his own psychiatrist and give a more accurate impression of his mental condition. Saltzburg argues, and we agree, that for these reasons all available evidence of defendant's mental condition should be put before the jury. *[End Text]*

In State v. Huson, 440 P2d 192 (1968), this court noted that "because of defendant's special plea of mental irresponsibility, anything said or done by him was relevant to his mental condition and therefore admissible."

[Text] Therefore, the attorney-client privilege should not extend to the testimony of a psychiatrist when the issue of insanity is raised by the defense. *[End Text]*

The trial court did not err in admitting the testimony of Dr. Parvaresh. — Pearson, J.

Dissent. By illegally tendering Bonds into Washington without benefit of a judicial finding of probable cause, the police officers violated the Fourth Amendment.

Even if I were to assume that the U.S. Constitution does not require this result, state law does. The arrest violates Washington as well as Oregon law. No Washington statute can or does authorize arrests outside of Washington. Furthermore, Bonds' extradition violated both states' laws. Both Oregon and Washington laws reflect the requirement of a charge filed against an individual before that individual may be legally extradited. Only where an out-of-state officer is in fresh pursuit of a suspect may he or she arrest outside state boundaries without a preexisting charge against the suspect. Bonds had not been charged with a crime nor had an arrest warrant issued at the time the officers unlawfully seized him. This unlawful seizure of Bonds dictates suppression of any evidence obtained as a result of these unlawful acts. Furthermore, Bonds' confession was not sufficiently attenuated from the illegality to justify denial of suppression.

While I concur with the majority's result in dealing with the admissibility of Dr. Parvaresh's testimony, I disagree with the majority's broad assertion that "the attorney-client privilege should not extend to the testimony of a psychiatrist when the issue of insanity is raised by the defense."

[Text] An attorney must have the freedom to consult with and the defendant must feel free to communicate with a psychiatrist retained for the purposes of facilitating the attorney-client relationship. If the prosecution could call such a psychiatrist when the defendant raises the insanity defense even when such psychiatrist is not called as a witness at any prior proceeding of the case, the attorney-client relationship would be substantially inhibited. *[End Text]* — Otter, J.

(State v. Bonds; Wash SupCt, 11/10/82)

OREGON USES "REASONABLENESS" TEST FOR SEARCH INCIDENT TO ARREST

Court rejects Supreme Court's approach in U.S. v. Robinson ▸15,431

A majority of the Oregon Supreme Court adopts a different, perhaps more restrictive, test for upholding a search incident to an arrest than the one adopted by the U.S. Supreme Court in U.S. v. Robinson, 414 U.S. 218 (1973). In Robinson, the Court held that a law enforcement officer's authority to make a full search incident to a lawful custodial arrest requires no justification beyond the fact of the arrest itself. The Oregon high court followed Robinson in State v. Florance, 527 P2d 1202 (1974), but decides to stop doing so. Instead, after examining the state constitution's warrant requirement, the majority makes the validity of a search incident to an arrest turn on whether the search is relevant to the crime for which a defendant is arrested and on the reasonableness of the search under the circumstances.

After the defendant was arrested in this case, her purse was taken from her. She was handcuffed and placed in a police car with a barrier between the front and back seats. The arresting officer, who held the defendant's purse in the front seat, opened it, found a wallet inside, opened the wallet's coin compartment, and found pills that turned out to be amphetamines.

Based on the fact that the arrest was for possession of a controlled substance, it was reasonable to believe that the defendant would carry contraband in her purse, the majority says. The defendant's admission that she was selling drugs, her companion's statement to that effect, and the closeness of the search in time and space to the arrest demonstrate the reasonableness of the search.

Justice Campbell, joined by Justice Tanzer, concurs in the result, based on an analysis of Robinson and other cases. The defendant's purse was personal property "immediately associated with the person of the arrestee" and therefore subject to a search incident to an arrest.

Chief Justice Lent dissents on the ground that no exigent circumstances justified the warrantless search of the purse. (State v. Caraher, 11/2/82)

Digest of Opinion. [Text] The issue in this case is whether a search of defendant's purse, including the opening of the coin compartment of a wallet within that purse, conducted without a warrant, after defendant was arrested and placed in a police car and the purse had been taken from her, is a search incident to arrest and therefore an exception to the warrant requirement of the fourth amendment to the U.S. Constitution and article I, section 9 of the Oregon Constitution. *[End Text]*

Police, arriving at the scene of a reported street altercation in Portland, found defendant Lois Marie Caraher lying on the hood of a parked car in a semi-conscious state. After she was revived, police questioned her about her activity in the area and she said that she was selling "bunk." Caraher's companion said that she had cocaine on her person. On the basis of these statements, an officer searched Caraher before handcuffing her and taking her into what one officer termed "protective custody" and another termed a "civil hold."

In a pocket of the jacket Caraher was wearing the officer found paper "bindles" containing a white powder. The officer, suspecting the substance to be cocaine, placed Caraher under arrest for possession of a controlled substance. A search of Caraher's person uncovered no further contraband or weapons. Her purse was taken from her. She was handcuffed and placed in the back seat of a police car which had a barrier between the front and back seats. On the way to the booking facility, the police officer who had made the arrest and who had Caraher's purse in the front seat opened the purse, found a wallet inside, opened the coin compartment of the wallet and found a white piece of paper, inside of which was a white cross-top pill and chunks of a similar pill. Subsequent lab analysis revealed the pills were amphetamines.

The trial court and the court of appeals upheld the search.

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No. 81-430

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and
SUSAN GATES,

Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

This brief is submitted by the State of Florida and joined by the following states and private organization:

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HISTORY

Americans for Effective Law Enforcement, Inc. (AELE) was founded in 1966 as a non-profit corporation for the purpose of establishing an "organized voice" for the law-abiding citizens regarding this country's crime problem, and to lend support to professional law enforcement. Its founders were Fred E. Inbau, now John Henry Wigmore Professor of Law Emeritus, Northwestern University; the late O.W. Wilson, then Superintendent of the Chicago Police Department; the late Harold A. Smith, a former President of the Chicago Bar Association; James R. Thompson, then on the Faculty of Northwestern School of Law and now Governor of Illinois; Alan S. Ganz and Daniel B. Hales, both Chicago attorneys; and Richard B. Ogilvie, then Chairman of the Cook County Board, and later Governor of Illinois.

AMICUS CURIAE PROGRAM

AELE became functional in early 1967 after having received a tax-exempt ruling from the IRS. The first project undertaken was the filing of a "friend of the court" (amicus curiae) brief in the United States Supreme Court in support of the constitutionality of the essential police practice of stopping a person reasonably suspected of having committed a crime or about to commit one, and then, for the police officer's protection, to frisk the person being stopped to insure the officer against being shot or otherwise physically harmed. That first case, *Terry v. Ohio*, decided in 1968, resulted in judicial approval of "stop and frisk."

Since the *Terry v. Ohio* case, and up until late 1982, AELE has filed 79 "friend of the court" briefs in the United States Supreme Court and in other federal and state appellate courts. Of 74 completed cases, only 20 or 27.0 percent were decided unfavorably to the AELE supported law enforcement position.

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Exclusionary-Rule Fight Moves to Supreme Co

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, Jan. 25 — Must criminals invariably be set free when the evidence of their guilt has been obtained through unconstitutional searches and seizures?

Emphatically not, says the Reagan Administration. And the Supreme Court, which has ruled since 1961 that the evidence must be suppressed in such cases no matter how heinous the crimes, how clear the guilt of the defendants, or how technical the police errors, may be changing its collective mind.

The issue, which has spurred popular outrage and scholarly debate for decades, is at the heart of a battle between the Administration and civil libertarians that is now being waged on two fronts, in Congress and in a potentially historic Supreme Court case. It involves what lawyers call the "exclusionary rule" — the judicial doctrine that evidence obtained in violation of the Fourth Amendment's ban against "unreasonable searches and seizures" cannot be used in criminal prosecutions.

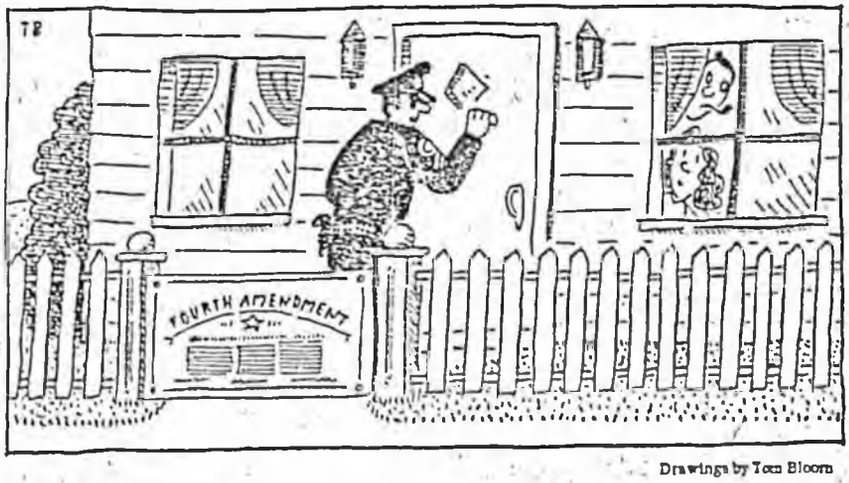
Abolishing or cutting back the exclusionary rule has long been at the top of the conservative anticrime agenda, although not all critics of the rule consider themselves conservatives. President Reagan campaigned against the exclusionary rule in 1980 and denounced it as "absurd" in a speech to a group of police chiefs in 1981.

'Good Faith' Argument

The Administration is expected to ask Congress again this year to create a broad new exception to the exclusionary rule, requiring Federal judges to admit evidence seized in violation of the Fourth Amendment if the officers acted "in the good faith, reasonable belief" that the seizure was legal.

Further, the Justice Department, in response to an unusual invitation from the Supreme Court, asked the Justices in mid-January to create such an exception with respect to state court prosecutions as well as Federal court prosecutions. A Court decision resolving the issue could head off a stormy fight in Congress, which is likely to wait and see what the Court does.

The Administration had already spent more than a year urging Congress to impose new limitations on the exclusionary rule when suddenly, in November, the scene of combat shifted. The Court said it would, in a pending case, consider creating a "good faith, reasonable belief" exception even without Congressional prompting.



Drawings by Tom Bloom

This would be the most sweeping limitation of the exclusionary rule since the Court first required its use in the Federal courts in 1914.

Any such limitation is strenuously opposed by many members of Congress, liberals especially, as well as the American Bar Association, the American Civil Liberties Union, at least two Supreme Court Justices and even a few prosecutors. They say dilution of the rule would encourage police lawlessness and imperil the liberties of the innocent as well as the guilty, without affecting the crime problem.

Some Propose Abolition

But the record suggests strongly that, with the addition of Sandra Day O'Connor to the Court's conservative wing in 1981, a majority of the Justices may now favor the Administration proposal.

Some judges, including Chief Justice Warren E. Burger, have said they would like to go well beyond the Administration proposal, abolishing the exclusionary rule entirely and developing other means of enforcing the Fourth Amendment. They say the rule does not produce benefits sufficient to justify its costs.

Many Administration officials share this view. But they do not think they could sell such a drastic step to a majority of the Supreme Court or of Congress.

Few issues in the criminal law have stirred such strong passions as the exclusionary rule, or subjected the courts to such vilification for being soft on crime. Legal scholars have argued endlessly over the rule's history, rationale and effects. Mr. Reagan and many ordinary citizens have been baffled and outraged by reports of cases in which criminals were freed on "technicalities" that required suppression of evidence establishing their guilt.

Why would the courts free a criminal on a technicality in any case?

'An Empty Promise'

The Supreme Court gave some weighty reasons in 1961 in a famous decision, Mapp v. Ohio, when it extended the exclusionary rule from prosecutions in the Federal courts to the state courts, saying that otherwise the Fourth Amendment would be "an empty promise."

The Court said it was necessary to deter police misconduct by removing the incentive to use unconstitutional means in search of evidence of crime, and that as a matter of principle and "judicial integrity," judges must not become accomplices in official lawlessness by sanctioning its use to obtain convictions.

Another factor stressed by advocates of the rule is that other legal means of putting teeth in the Fourth Amendment, such as suits for damages against officers who violate the Fourth Amendment, have proven ineffective. Even the Justice Department virtually concedes th its skillfully reasoned, 6 preme Court brief, while hopefully that better remed developed.

There is some evidence t clusionary rule has spurred partments to train their comply with the Fourth A But the Justice Departm argued that "the deterrea of the rule is drastically not wholly eliminated, wh voked to suppress evidenc by a reasonably well-trai officer in the belief that h did not violate the Four ment."

Warrant Ruled Inv

The brief also said that cers making on-the-spot cannot be expected une apply all the fine points Amendment law that judg down in a host of complex cal precedents, let alone t 5-to-4 Supreme Court deci ing new fine points.

In the case now before t Court, Illinois v. Gates, courts suppressed evidenc ple had been involved in a marijuana transaction. T search warrant obtained h on the basis of an anonym been issued without "prob and was thus invalid. Th pealed, and the Justice D entered the case as a fr court.

The department seems h a sympathetic hearing f jority of the nine Justices has already held the exclu inapplicable in habeas co jury and some other proce cent years, reasoning th outweighed its benefits i texts.

While only Chief Justice Justice William H. Reh called for abolishing the e rule, Justices Byron R. W F. Powell Jr. and Harry A have also expressed dou And Justice O'Connor hi port for a "good faith" her Senate confirmation h

SB49

Bill Bryson, Esq
712 W 6th Ave
Anchorage 99501
(907) 277-5611
VP of TLH & exec director of State Fair
Represents men of the defense bar

Justice defends 'exclusionary rule'

by Ralph Nichols
Times Writer

Supreme Court Chief Justice Edmund Burke said Wednesday the "exclusionary rule" probably will be experimented with in attempts to reduce instances where judges exclude illegally obtained evidence from use against criminal defendants.

But Burke said before the Alaska Press Club he doesn't anticipate radical changes in either state or federal court rulings protecting the rights of the accused.

He said this includes both the exculsionary rule and the Miranda Rule — which requires that defendants be read their rights and given the opportunity to consult with an attorney before making a confession.

Burke said later "the Legislature probably is a greater source of the answer than the courts. The courts don't have much latitude."

But, he added, the state Supreme Court would strike down any law amending the exlusionary rule if it failed to meet constitutional protections against unreasonable searches and seizures.

The Legislature currently is considering Senate Bill 713, sponsored by by Sen. Ed Dankworth, R-Anchorage, which would allow illegally obtained evidence to be introduced in court unless "the violation was substantial." It would require a judge, before excluding such evidence, to consider:



EDMUND BURKE
'There are no easy answers'

— "the extent to which exclusion will tend to prevent future deviations (by the defendant) from lawful conduct;

— "the extent to which privacy was invaded (and) the extent of deviation from lawful conduct;"

— "whether the peace officer acted in good faith and in the reasonable belief that his actions were legally authorized."

Burke didn't comment on Dankworth's bill because, he said, eventually he might have to rule on it.

Problems with the exclusionary rule usually arise because a law enforcement officer forgot part of his job or tried to shortcut it, Burke said. This usually happens with younger officers, since "no competent (experienced) officer ought to be ignorant of Miranda, of the exclusion rule and the warrants required," he added.

The exclusion of illegally obtained evidence, which sometimes results in criminals going free on "mere technicalities," upsets many, Burke said. But, he added, the rule is intended to prohibit unlawful conduct by (law enforcement officers) who have sworn to uphold the law.

"We don't want the police coming to our house in the middle of the night knocking down the door, and we don't want to allow torture, either physical or mental," he said.

Burke noted that the late U.S. Supreme Court Justice Louis Brandeis said society can't condone and utilize and thereby become a party to unlawful conduct by its officers.

U.S. Supreme Court Justice Warren Burger has harshly criticized the exclusionary rule, saying "there is something wrong with a system that allows a defendent to escape the consequences of good, sound evidence," Burke continued. Yet even Burger doesn't favor abolishing the rule, he said.

The exclusionary rule — both in state and federal courts — is like an "unwanted child," Burke said. "It is unwanted by those who criticize it, yet it is needed . . . There are no easy answers," he added.

Alaska State Legislature

SENATOR
FRITZ PETTYJOHN
SRA BOX 2385 M
ANCHORAGE, ALASKA 99510
907/345-5174

LEGISLATIVE ADDRESS
POUCH V - STATE CAPITOL
JUNEAU, ALASKA 99811
907/465-3473

Senate

February 8, 1985

Mr. Jim Kentch
3411 W. 64th Avenue
Anchorage, Alaska 99502

Dear Mr. Kentch:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

Senator Fritz Pettyjohn

Alaska State Legislature

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FRITZ PETTYJOHN
SRA BOX 2385 M
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907/345-5174

Senate

LEGISLATIVE ADDRESS
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JUNEAU, ALASKA 99811
907/465-3473

February 8, 1983

Anchorage Police Department
Municipality of Anchorage
Pouch 6-650
Anchorage, Alaska 99502

Dear Peace Officers:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I look forward to your participation.

Sincerely,

Senator Fritz Pettyjohn

Alaska State Legislature

SENATOR
FRITZ PETTYJOHN
SRA BOX 2385 M
ANCHORAGE, ALASKA 99510
907/345-5173



LEGISLATIVE ADDRESS
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JUNEAU, ALASKA 99811
907/465-3473

Senate

February 8, 1983

Anchorage Bar Association
Post Office Box 3715
Anchorage, Alaska 99501

Dear Attorneys:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Senator Fritz Pettyjohn

Alaska State Legislature

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SRA BOX 2385 M
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907 345-5174

Senate

LEGISLATIVE ADDRESS
POUCH V - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3473

February 8, 1983

Alaska State Troopers
Department of Public Safety
Post Office Box 6188 Annex
Anchorage, Alaska 99502

Dear Troopers:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Senator Fritz Pettyjohn

Alaska State Legislature

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Senate

LEGISLATIVE ADDRESS
POUCH V - STATE CAPITOL
JUNEAU, ALASKA 99811
907/465-3473

February 8, 1983

American Civil Liberties Union
Post Office Box 10-1226
Anchorage, Alaska 99511

Dear Attorneys:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Sincerely,

Senator Fritz Pettyjohn

Alaska State Legislature

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Senate

LEGISLATIVE ADDRESS
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JUNEAU, ALASKA 99811
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February 8, 1983

Mr. Mike Spaan, Esq.
Assistant Attorney General
United States Court House
Federal Building, Room 6252
701 "C" Street
Anchorage, Alaska 99501

Dear Mike:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Sincerely,

Senator Fritz Pettyjohn

Alaska State Legislature

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LEGISLATIVE ADDRESS
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JUNEAU, ALASKA 99811
907/465-3473

Senate

February 8, 1983

Alaska Bar Association
Post Office Box 279
Anchorage, Alaska 99510

Dear Attorneys:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Sincerely,

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Alaska State Legislature

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LEGISLATIVE ADDRESS

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JUNEAU, ALASKA 99811
907/465-3473

Senate

February 8, 1983

Peace Officers Association
Post Office Box 2381
Anchorage, Alaska 99510

Dear Peace Officers:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Sincerely,

Fritz Pettyjohn

Senator Fritz Pettyjohn

Alaska State Legislature

SENATOR
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SRA BOX 2385 M
ANCHORAGE, ALASKA 99510
907/345-5174



Senate

LEGISLATIVE ADDRESS
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907/465-3473

February 8, 1983

Mr. Vic Krumm, Esq.
District Attorney
Third Judicial District
941 W. 4th Avenue
Anchorage, Alaska 99501

Dear Vic:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

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Sincerely,

Senator Fritz Pettyjohn

Alaska State Legislature

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Senate

LEGISLATIVE ADDRESS
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JUNEAU, ALASKA 99811
907/465-3473

February 8, 1983

Anchorage Chamber of Commerce
415 "F" Street
Anchorage, Alaska 99501

Dear Chamber Members:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

Senator Fritz Pettyjohn

Alaska State Legislature

SENATOR
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LEGISLATIVE ADDRESS

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JUNEAU, ALASKA 99811
907/465-3473

Senate

February 8, 1983

Alaska Crime Commission
c/o Anchorage Chamber of Commerce
415 "F" Street
Anchorage, Alaska 99501

Dear Commissioners:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

Senator Fritz Pettyjohn

Alaska State Legislature

SENATOR
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Senate

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JUNEAU, ALASKA 99811
907/465-3473

February 8, 1983

Mr. Ben Esch, Esq.
3223 W. 31st Avenue
Anchorage, Alaska 99503

Dear Ben:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

Senator Fritz Pettyjohn

Alaska State Legislature

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FRITZ PETTYJOHN
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LEGISLATIVE ADDRESS

POUCH V · STATE CAPITOL
JUNEAU, ALASKA 99811
907/465-3473

Senate

February 8, 1983

Ms. Holly Ploog
701 W. 58th Avenue
Anchorage, Alaska 99502

Dear Ms. Ploog:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

Senator Fritz Pettyjohn

Alaska State Legislature

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907/345-5174

Senate

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POUCH V - STATE CAPITOL
JUNEAU, ALASKA 99811
907/465-3473

February 8, 1983

Mr. Bill Cook, Esq.
1007 W. 3rd Avenue #304
Anchorage, Alaska 99501

Dear Bill:

A public hearing on Senate Bill 49 is scheduled for Friday, February 18, at 9:30 a.m., in the jury assembly room in the basement of the State Court Building at 303 "K" Street, Anchorage.

Senate Bill 49 would create a "good faith" exception to the current exclusionary rule. If you would like to testify at that hearing, please contact my office. I would look forward to your participation.

Sincerely,

Senator Fritz Pettyjohn

TO: Judiciary Committee Members

FROM: John Gabrielli, Counsel

DATE: Feb. 8, 1983

RE: SB 49 - Exclusionary Rule

Additional materials on the captioned subject, recently received from the U.S. House of Representatives and other sources, copies of which will be available to you on request, are as follows:

Statement of Professor William M. Greenhalgh, Chairperson of American Bar Association's Legislation Committee, Criminal Justice Section, June 2, 1982--3 pgs.

Statement of Stephen H. Sachs, Attorney General of Maryland, June 9, 1982--23 pgs.

Statement of D. Lowell Jensen, Asst. U.S. Attorney General, June 2, 1982--24 pgs.

NOTE: Is it Time For a Change in The Exclusionary Rule? United States v. Williams and The Good Faith Exception, 60 Wash. L. Q. 161 (1982)--pgs.

To: Members of Judiciary Committee

From: Committee Counsel

DATE: 2/4/83

RE: Senate Bill 49

In addition to the materials previously provided to you and included in your SB 49 file, I have obtained the following:

R. Posner, Rethinking The Fourth Amendment (unpublished article dated Sept. 22, 1981, on file with the Georgetown Law Journal)--37 pgs..

Government's Amicus Curiae brief in Illinois vs. Gates (the good faith exception to the Exclusionary Rules case currently pending before the U.S. Supreme Court)--34 pgs.

Research letter and attachments, dated 2/6/81, from Barry Stern to Senator Rodey, discussing alternatives to good faith exceptions to Exclusionary Rule--10 pgs.

Geller, Is the Evidence in on the Exclusionary Rules?, 67 A.B.A. Journ. 1642 (1981)--4 pgs.

Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo. L. J. 1361 (1981)--34 pgs.

Geller, Enforcing the Fourth Amendment: The Exclusionary Rules and its Alternatives, 1975 Wash. U.L.Q. 621--101 pgs.

Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978)--22 pgs.

Colorado's Good-Faith Exception to the Exclusionary Rule, 11 Colo. Law. 410 (1982)--6 pgs.

Good Faith Exception to the Exclusionary Rule: The Amendment is not a Technicality, 11 Colo. Law 704 (1982)-- 5 pgs.

These materials are on file in my office (Capitol Bldg., Rm 123--Ext. 4451); copies will be provided on request.

ALASKA BRIEFS

FAA conducts seminar

Medical aspects of flying, including the way over-the-counter drugs can affect aviation safety, will be discussed by Dr. Norm Wilder, former Air Force flight surgeon who now practices in Anchorage, at an aviation safety-education seminar at 7 p.m. Feb. 14.

The seminar is part of a series of safety meetings conducted the second Monday of each month by Tom Carter, Federal Aviation Administration accident prevention specialist.

All Alaskan pilots and student pilots are invited to attend the meeting which will be held at FAA's Anchorage Flight Service Station building on Merrill Field.

Question-answer session

District H-14 legislators, including Sens. Rick Halford and Tim Kelly and Reps. Walt Furnace and Ramona Barnes, will have an informal question-and-answer session at 6 p.m. Thursday.

Persons interested in participating should meet at the Legislative Information Center, 1024 W. Sixth Ave. and at Chester Valley Elementary School, 1750 Patterson.

For more information, call 278-3668.

Legislators meet voters

Legislators representing South Anchorage and the Kenai Peninsula, including Sens. Don Gilman and P. Fischer and Reps. Hugh Malone, Milo Fritz, Bette Cato and Mike Szymanski, will meet their constituents at 7 p.m. Thursday.

The meeting will be an open question-and-answer format held via the teleconference at sites in Anchorage, Homer, Seward, Soldotna and Valdez.

For more information, call 278-3668.

Hearing to review bill

The Senate Judiciary Committee, chaired by Sen. Bill Ray, will have a public hearing on a bill limited the use of judicial exclusion at 11:30 a.m. Wednesday.

The bill would "limit application of the exclusionary rule when a good faith search only results in technical violation of the constitutional guarantee against unlawful search and seizure."

The public is encouraged to participate at the Legislative Teleconference Network, 1024 W. Sixth Ave.

For copies of the bill or more information, call 278-3668.

Public to discuss issues

State Rep. Rick Uehling, R-Anchorage, will have a public meeting for constituents of downtown district 12-A at 7 p.m. Friday.

The meeting will be in the second-floor conference room of the Anchorage Legislative Information Office at 1024 W. Sixth Ave. Current issues of concern and the various bills introduced in the legislature will be the topics for discussion.

District 12-A includes Fairview, City View, Government Hill, Airport Heights, Inlet View and downtown proper.

The Exclusionary Rule

Justices to take question of policemen's good faith



On May 3, 1978, the Bloomingdale, Illinois, police department received an anonymous handwritten letter alleging that Susan Gates and her husband, Lance, were planning to travel to Florida in a few days to make a drug buy. The letter described in some detail the Gateses' travel plans, stating that they would be driving back with $100,000 in drugs and that they already had that amount of drugs stored in their basement.

For several days, police worked practically round the clock, according to prosecutors, and were able to verify such information as flight numbers and a change of address. On May 6 the police got a search warrant for the Gateses' home and car. The next day, as the Gateses drove up to their home, police executed the warrant and found several bundles of marijuana in the trunk of their Mercury and more marijuana, weapons, ammunition, drug paraphernalia and several scales in the house. The Gateses were indicted for unlawful possession of cannabis with intent to deliver and unlawful possession of a controlled substance, cocaine. Lance Gates was indicted in addition for possession of an unlicensed firearm. Their motion to quash the warrant as based on inadequate underlying facts was granted by Du Page County Circuit Court, and the Illinois Supreme Court affirmed.

Since 1961, the judicial deterrent to unconstitutional police intrusions has been a rule requiring exclusion at trial of otherwise relevant evidence. The U.S. Supreme Court has whittled away at the exclusionary rule since then, and now the court appears ready to modify it substantially to allow an exception where police acted on a reasonable good faith belief that their conduct was legal. The case chosen by the court to consider the viability of that rule is *Illinois v. Gates* (No. 81-430).

When the case was first argued last year before the U.S. Supreme Court, it was noteworthy because it gave the justices the opportunity to determine for the first time when police may use an anonymous tip to establish probable cause for issuance of a search war-

rant. Police informants usually are merely confidential; courts regard an *anonymous* tip as inherently unreliable as a basis for a probable cause finding.

As the case awaited decision, that issue alone caused stirrings in the press and also among criminal procedure authorities. But when the Supreme Court restored the *Gates* case to its calendar for reargument later this year on the additional issue of the good faith exception, a tremor went through both sides of the criminal bar. It was the first time the court had agreed to confront the question squarely.

Fourth Amendment experts agree that some major modification of the exclusionary rule is in the offing, but they disagree about how far the court will go with the good faith exception. Some say any good faith exception would be a significant erosion of the Warren Court's landmark decision in *Mapp v. Ohio*, which applied the exclusionary rule to the states. "I'm personally against any modification of the exclusionary rule because, as a practical matter, there's not much left of it anyway," said Yale Kamisar, professor at the University of Michigan Law School. But Kamisar and others concur that because police in the *Gates* case took the trouble to get a warrant, a good faith exception would not lessen the rule's deterrent effect on police misconduct in executing warrantless searches and seizures. "It would be less disturbing to modify the exclusionary rule where the police did make the effort to get a warrant," Kamisar said.

The problem with the *Gates* warrant is that it might not satisfy the two-prong test for judging the adequacy of an informer's tip in establishing probable cause: that there be facts showing both the informer's veracity and the source of his knowledge. Illinois recognized that inadequacy in asking the Supreme Court last February to consider a reasonable good faith exception "assuming, *arguendo*, that the information used to obtain the search warrant" was insufficient. The court denied the motion. Later, in oral arguments, several justices seemed to indicate that the affidavit "shrieked with probable cause," according to Allan Ackerman, a Chicago attorney for the Gates couple.

Nevertheless, the "weakest link" in the affidavit was the paucity of information about how the informer knew the drugs were in the home—raising serious questions about the probable cause for that search, he said.



Moylan: A good faith exception in all cases would be a "very messy thing."

Summers: Put the fault where it belongs—with the judge.

The high court's change of mind in agreeing to address the good faith exception issue (three justices dissented from the order granting reargument) has puzzled many observers. Judge Charles Moylan Jr. of the Maryland Court of Special Appeals surmises that the justices might find less than probable cause on the face of the affidavit, but that reasonable good faith efforts by the police brought the warrant up to constitutional standards.

With the question squarely before the court, the state argues that the court should "get back to basics" by abolishing the two-prong test in anonymous tip situations, said Paul Biebel, first assistant Illinois attorney general. The test should apply only to information from confidential police informers, he said. With anonymous tips, "thorough diligent police work over a short period of time" — as in the *Gates* case — should be allowed to support any deficient probable cause, Biebel contended. And at any rate, the great detail of the tip and the extent of police corroboration cured any deficiency under the two-prong test, he added.

The exclusionary rule loses its purpose—deterring illegal police conduct—when police did everything they could to satisfy the Fourth Amendment, said William Summers, supervising attorney for the International Association of Chiefs of Police. If the *Gates* affidavit failed the two-prong test, fault should be placed with the judge in issuing the warrant, not with the police, Summers said.

The case cited for the reasonable good faith exception is *U.S. v. Williams* (622 F.2d 830), a 1980 decision in which the U.S. Court of Appeals for the Fifth Circuit noted two situations in which the exception might apply. The first—if an officer is mistaken about the existence of facts sufficient to establish probable cause — might apply to the *Gates* case. The other situation arises when an officer relies on a statute, warrant or precedent that is later ruled invalid. The *Williams* holding has been followed in certain contexts by the highest courts of Delaware, Illinois, Kentucky, Louisiana and New York, according to Norman Darwick, IACP executive director.

Fourth Amendment scholars have expressed major misgivings, however, about the practicalities of implementing a good faith rule. The exception would cause Fourth Amendment law to "ossify," said Silas Wasserstrom, associate professor at Georgetown University Law Center. Judges would no longer have any reason to decide if there was any illegal police conduct if a case could be decided on the basis of a good faith belief, he added.

The biggest problem concerning the good faith exception is that the legal definition of probable cause—a reasonable belief—"breaks down and you get an ambiguous standard like a 'reasonable

unreasonable belief,'" said William Mertens, assistant professor at the University of Oklahoma College of Law and author of the amicus brief in *Gates* for the American Bar Association. "What you're saying is the police had a reasonable belief to act unreasonably," said Kamisar.

The effect of a "more spongy standard" for probable cause, Kamisar said, is that judges will have more leeway in issuing warrants. A good faith exception will "confront judges with an impossible task" of determining probable cause, and "their natural tendency will be to defer to the police," said Wayne LaFave, professor at the University of Illinois College of Law. LaFave theorizes that the high court might want to announce a good faith exception rule before Congress acts on a Reagan administration criminal justice bill that contains a reasonable good faith provision. (S. 2903 was left on the Senate calendar at the end of the last session.) He said five justices have leaned toward a good faith exception, including Justice Sandra Day O'Connor, who expressed reservations about the exclusionary rule during her confirmation hearing in September 1981.

Judge Moylan predicts the court will not apply a good faith exception to all cases. "It would be very difficult to administer since it would involve going into the police officer's mind in every case," which would be "a very messy thing" given overcrowded court dockets. Moreover, Moylan said a broad good faith exception also "puts a premium on police ignorance," because "the dumb cop comes off having acted in good faith and the good cop comes off having acted in bad faith—he of all people should have known better."

Thus, Moylan agrees that because *Gates* involves a warrant, adoption of a good faith exception in that case would not gut the exclusionary rule. The two-prong test for assessing probable cause based on an informer's tip would still be good law, he said. But, he added, "we won't police the judges with the exclusionary rule," and henceforth an affidavit that fails the test might be redeemed if the police had a reasonable good faith belief that there was probable cause. Under this type of theory, Kamisar said the limited good faith exception would apply where police obtained a warrant with only "plausible" probable cause, didn't falsify or misrepresent facts, and gave the investigation "a fair and honest shot." —*Bill Winter*



Kamisar: Is a "reasonable belief" enough?



Cooke: An attractive supply to cope with a monstrous demand.

Out of Mothballs

Why not use retired judges?

As one approach to the huge backlog facing New York's civil and criminal courts, a committee headed by former New York City Mayor John Lindsay has proposed creating the posts of judicial hearing officers and appointing retired judges to fill them.

More than 90 percent of the retired judges responding to a questionnaire sent by the committee, set up by Chief Judge Lawrence Cooke, said they were interested in serving the court system again.

The hearing officers would perform some of the duties now handled by sitting judges and referees, including hearing certain matters in civil proceedings, hearing and reporting on pretrial motions in criminal cases and with the consent of the parties, hearing minor criminal trials that don't require a jury.

The committee said its proposal's success would rest on "the willingness of the sitting judges to . . . put judicial muscle behind" the new officers and on lawyers' use of them. The committee said only minor legislative changes would be necessary to enact its proposal, along with an appropriation that would pay the retired judges $200 a day.

Cooke said the committee's report "offers an attractive and new item of supply to cope with the monstrous demand being imposed upon our judicial system and its components." He praised its members, urging them to continue "until the whole job is done."

—*Martha Middleton*

Sen Jud
103

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SB 49
Title "An Act relating to the exclusionary rule ...."
Requested by Senate Judiciary Committee Date 1/24/83

II. FISCAL DETAIL
Agency Affected Department of Law
Program Category Affected Administration of Justice
ERU, Program, Or Subprogram(s) Affected Prosecution
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL		-0-	-0-	-0-		

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						
		-0-	-0-	-0-		

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)
This bill creates a "good faith" exception to the exclusionary rule. It allows the use in court of "illegally seized" evidence if the officer who seized the evidence was acting on a good faith belief that his actions conformed to law. This bill is not expected to require the commitment of additional prosecution staff or resources. Defense motions to prevent the use at trial of allegedly illegally seized evidence are filed in many criminal cases now, and in most felonies. It is expected that the scope of these hearings might change somewhat under the provisions of this bill, and may focus more upon the reasonableness of the officers belief that his conduct was permissible under the law. It is possible that the bill could benefit prosecution efforts if it decreases the amount of evidence which is now lost to the prosecution through successful defense suppression motions.

IV. DATE 1/28/83 PREPARED BY Daniel W. Hickey, Chief Prosecutor
AGENCY Department of Law
PHONE 465-3428

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

83-001 (Rev. 12/82)

RECEIVED

Testimony of

Sue Marie Johnson
Deputy Director
Police Executive Research Forum

before the

Subcommittee on Criminal Justice
Committee on the Judiciary
United States House of Representatives

Concerning

The Operation of the Exclusionary Rule

June 9, 1982

Mr. Chairman, thank you for providing to the members of the Police Executive Research Forum this opportunity to express our views on the exclusionary rule and certain proposed alternatives to it. The Forum is an organization of police chief executives from the nation's larger jurisdictions. Our goal is to improve the delivery of police services by promoting and bringing about the further professionalization of police executives and officers. We conduct research, engage in experimentation and provide a forum for debate on a wide range of criminal justice issues. It is our belief that, from these efforts, substantial improvement in the quality of law enforcement services will result.

Recently, several alternatives to the exclusionary rule have been proposed in response to dissatisfaction with the effects of the exclusionary rule. We in local law enforcement confront the effects of the exclusionary rule continually; how the rule now operates in criminal proceedings disillusions us. Still, we do not think that the alternatives suggested by critics of the exclusionary rule offer the best means of remedying the ill-effects of the rule, or of achieving the rule's primary objective: to deter unconstitutional police conduct.

What we would like to recommend is a substitute process, one that will not only serve the purposes of the rule but will also broadly influence the improvement of policing. We envision a process by which the responsibility for deterring police violations of citizens' constitutional rights is given to police administrators; they can carry

such responsibility most effectively; the judiciary can deter police violations only indirectly. The change in focus of the judicial sanction, from individual officers to their departments, will provide to police agencies the necessary incentive to institute programs for effectively deterring constitutional violations by their officers; that is because, if such programs are not implemented, the exclusionary rule will continue to be applied. If police administrators show that they can carry this responsibility, that they can execute it diligently, then the need to apply the exclusionary rule in individual cases will disappear, constitutional rights will be protected, reliable and relevant evidence will be used in trials, and the effectiveness of our criminal justice system will be enhanced.

Adopting our proposal to redirect responsibility for deterring police violations of constitutional rights from the judiciary to the police is risk free. In respect of those who believe that, to ensure true justice in criminal proceedings, the exclusionary rule must be eliminated or curtailed, our proposal provides satisfaction; it is limited only by the potential of police administrators to protect individuals' constitutional rights. Regarding those who believe that the elimination or curtailment of the exclusionary rule means more police violations of individuals' constitutional rights, our proposal guarantees that the exclusionary rule will be applied whenever the judiciary determines that police departments are not ensuring that individuals' constitutional rights will not be violated. Our proposal

guarantees that both agendas in the exclusionary rule debate will be accomplished. Each of the other proposed alternatives to the exclusionary rule forces an either-or choice: you are either for the exclusionary rule, or you are against it. Our proposal is better than the other alternatives, not only because it supports, at once, the interests expressed in both of these positions, but also because it more realistically provides for achievement of the judiciary's objectives in applying the exclusionary rule.

Objectives of the Exclusionary Rule and Problems Related to Its Application

The exclusionary rule was first enunciated in the 1914 Supreme Court decision, Weeks v. United States, 232 U.S. 383 (1914). The rule was devised as a remedy for violations of citizens' constitutional rights secured by the Fourth Amendment.

Initially, the Court held that this remedy applied only in federal prosecutions. Wolf v. Colorado, 338 U.S. 25 (1949). The Court left the states free to experiment with alternative sanctions for constitutional violations by law enforcement officers. Unfortunately, state and local officials, including those in law enforcement, did not heed the Court's warnings and failed to develop remedies that would secure compliance with the Fourth Amendment's provisions. The consequence of their inaction was the Supreme Court's 1961 decision in Mapp

v. Ohio, 367 U.S. 643 (1961), to extend the exclusionary-rule remedy to state courts.

The Rule's Objectives

The essence of the exclusionary rule is that evidence obtained in violation of Fourth Amendment requirements cannot be used against defendants in criminal proceedings. In Weeks and subsequent opinions, the Supreme Court offered a number of rationales for applying the rule, the major ones being, first, to maintain judicial integrity by removing the judiciary from the taint of partnership in unlawful behavior of law enforcement officers and, second, to deter future violations by prohibiting law enforcement officers from profiting by their lawless behavior. See, Weeks at 392 and Mapp at 648, 652, and 659-60.

Throughout the history of the exclusionary rule, the Court extended the rule's application beyond Fourth Amendment search and seizure violations to violations of the Fifth Amendment [United States v. Ade, 388 U.S. 218 (1967)], the Sixth Amendment [Miranda v. Arizona, 384 U.S. 436 (1966)] and the Fourteenth Amendment [Irvine v. California, 347 U.S. 128 (1954)]. While the sanction was being extended, however, the judicial integrity argument lost its force as an independent justification. Today, the deterrence rationale is the predominant consideration in courts' decisions regarding suppression motions; judicial integrity is a consideration that is secondary to

courts' assessments of whether or not the sanction will deter future violations. See, Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974); United States v. Janis, 428 U.S. 423, 458-59 n.35 (1976); Dunaway v. New York, 442 U.S. 200, 218 (1979).

We believe that the deterrence rationale no longer provides a reasonable justification for the rule as the rule is currently applied. Though deterrence of unconstitutional police conduct is a goal we all seek to achieve, the exclusionary rule, by itself, does not constitute an appropriate means of achieving this goal.

By our criticism we are not suggesting that the rule has failed to assist in improving our system of justice. Two major benefits of the rule's application can be identified. The first benefit is that the rule has provided to defendants an incentive to challenge the propriety of conduct of law enforcement personnel; this has led to the judiciary's focusing on the requirements of constitutional behavior as these affect police. The second benefit is constituted by the indirect, long-range effects that these judicial rulings have had on police behavior; the educational aspect of decisions that have identified certain actions as improper have led police administrators to pay more particular attention to the requirements for constitutional procedure and, as a consequence, training of police officers has improved. Whether or not these two major benefits could have been realized without the rule, or under a different sanction, will never be

known. Notwithstanding the benefits, the current level of dissatisfaction with the rule and the problems it presents require us to heed now the Court's warnings and find new ways to serve the purpose of the rule.

Ascertaining a means of measuring the deterrent effect of the rule as the rule is currently applied has proven elusive; this condition has intensified debate about the point at which a balance, if any, can be struck between the benefits of the deterrent effect and the costs to the criminal justice system and society. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 27 University of Chicago Law Review 665 (1970); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 Journal of Legal Studies 243 (1973), Canon, Is the Exclusionary Rule Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Kentucky Law Journal 681 (1974); Comptroller General of the United States, Impact of the Exclusionary Rule in Federal Criminal Prosecution, Report Number GGD-79-45 (19 April 1979). Instead of further debating such issues, we want here to share our expertise as law enforcement administrators in the process of developing a suitable alternative to the rule. Abolishing the rule without substituting an effective mechanism for it amounts to a mere experiment, one in which we are not willing to engage. It is clear, however, that something must be done; the courts cannot do it themselves. We believe it is incumbent upon

the law enforcement community to work with the judiciary and the legislatures to devise a suitable alternative.

Disadvantages of the Rule

Apart from doubts about whether or not the ru has achieved its objective of deterrence, use of the rule has led to several problems, some of which are more burdensome than those that the rule was originally intended to remedy. From the many problems discussed by commentators, we have deducted seven major arguments.

In a first line of argument it is posited that the exclusionary rule interferes with justice by distorting truth. Reliable, relevant evidence that would be admitted if obtained legally is excluded from the fact-finding process when obtained in violation of constitutional commands.

A second line of argument stresses that endlessly litigating the validity of searches, seizures and other law enforcement procedures causes delays in the trial process and diverts attention from questions of guilt and innocence; focus shifts from alleged wrongdoings of defendants to allegations about police, vitiating attempts to provide swift and certain punishment for criminal activity.

A third contention is grounded in the following perception: respect that law enforcement personnel and citizens have for the law and our criminal justice system is destroyed by the rule. Instead of

operating as a deterrent, the rule encourages some police officers to twist facts and stretch the truth about searches; there is the spectacle, too, of the guilty going free because of technical errors.

A fourth line of argument is based on assertions that the rule protects only those who face criminal prosecution, and that the rule cannot deter violations of constitutionally guaranteed rights when the police have either no interest in prosecuting or are willing to forego successful prosecution in the interest of pursuing other goals.

In a fifth line of argument it is charged that the rule fails to discriminate degrees of misconduct by police officers and degrees of harm done to victims of such conduct; regarding punishments, no rational distinctions are made between minor offenses and serious crimes or between honest mistakes and deliberate, flagrant violations.

A sixth argument is that the rule discourages internal rule-making and inhibits disciplining of errant police officers because there is fear that the very fact of punishments' being administered because of rule violations can itself be used as evidence to bolster defendants' cases for suppressing evidence obtained by illegal methods.

In a seventh line of argument it is submitted that the exclusionary rule adds to the confusion about Fourth Amendment standards for

reasonable searches and seizures. Trial court judges often tortuously construe the definitions of the Fourth Amendment so they can find that searches and seizures were reasonable and avoid the harsh requirement of excluding evidence. This gives rise to minute and often bizarre gradations in legal and illegal conduct, eliminating incentives to improve police procedures: incentives that could be provided by pointing out errors and penalizing officers.

The Forum's Alternative to the Exclusionary Rule

If an alternative to the exclusionary rule is to be acceptable, it must meet two objectives. First, it must operate as a deterrent to police misbehavior by providing a clear and understandable guide to proper conduct under the Constitution and by further providing incentive to take immediate disciplinary actions in response to violations. Second, it must remove those obstacles created by the exclusionary rule, which obstacles now prevent the guilty from being convicted, so that evidence of guilt can be used in trials.

Though deterrence of unconstitutional police conduct is the main rationale for the exclusionary rule, the effectiveness of the rule, as it currently operates, in achieving the goal of deterrence is in serious question. The apparent lack of deterrence results, in plain terms, from a lack of communication: the courts, in their rulings on motions to suppress, fail to communicate to police

departments the specific requirements of the Fourth Amendment, and the police fail to educate the courts to the realities of law enforcement practices. Much of this owes to the fact that the exclusionary rule sanction is directed against individual officers.

Effective communication between the courts and the police is vital to making most productive our efforts to preserve constitutional rights. Abolition of the rule, or a good faith exception to it, will not solve the problem of poor communication. A process must be devised to ensure that police awareness of constitutional restrictions and of the necessity of operating within those restrictions is increased. We believe that directing the judicial sanction of exclusion away from individual police officers to police administrators will accomplish that objective.

As law enforcement executives, we know best how to deter our officers from improper conduct. In areas of officer misconduct other than constitutional violations--one such area being the unauthorized use of deadly force--experience tells us that improper behavior can be curbed by putting to use three tools in combination: rule-making, training, and discipline. For example: in his study of shootings by officers from the New York City Police Department, Professor James Fyfe found that significant reductions in the amount of police use of deadly force were associated with the combined implementation of clear rules which guide officers in the use of force and of procedures to strictly enforce the rules. [See, Fyfe, Administrative Interventions on Police

Shooting Discretion: An Empirical Examination, 7 Journal of Criminal Justice, 309 (1979).] Currently, however, some police administrators fail to develop precise rules regarding Fourth Amendment procedures and fail to discipline officers for constitutional violations because they fear that such actions will be used against them in suppression hearings: the exclusionary rule as it is currently applied creates for police administrators a disincentive to accept responsibility for deterring constitutional violations.

What is needed is a process that eliminates disincentive and, simultaneously, provides to police administrators incentive to accept responsibility for deterring misconduct regarding Fourth Amendment procedures.

The process by which we propose to meet these needs, especially the need to provide incentive, is one in which application of the exclusionary rule would be dependent upon the performance of police departments themselves. The concept is that the exclusionary rule would not be applied if the police department in question had taken seriously its responsibility to adhere to Fourth Amendment procedures. Departments could demonstrate proof of such good faith by meeting the following three requirements:

1. Publishing departmental rules and regulations that guide police on proper constitutional procedures;

2. Instituting effective programs to train officers according to these rules and regulations; and

3. Maintaining a history of disciplinary actions taken against officers, it having been demonstrated that the officers had committed violations of departmental rules.

The procedure by which this alternative would be implemented is as follows:

1. The judge would rule on whether or not the officer had committed a constitutional violation.

2. If the judge rules, yes, the prosecutor could then undertake to have the evidence admitted according the following procedure: the prosecutor would ask the judge to review the police department's regulations, training programs and disciplinary history.

3. The prosecutor would have the burden of proving that the police met the three requirements (mentioned above) in a manner sufficient to ensure--

   -- that the failure to provide a rule was reasonable, and that regulations specifying, and training in, the proper methods for proceeding in the particular circumstances under review would be immediately forthcoming; or

   -- that, if the department already had a rule covering the circumstance, the officer would be disciplined for violating the rule unless the officer was acting reasonably and in good faith; or

   -- that, if the departmental rule was found to be unconstitutional, it was promulgated in good faith, appeared reasonable before it was applied to the particular facts under review, and would be reissued in proper form.

Should the prosecutor fail in an attempt to prove that the department met the above conditions, the judge would exclude the

evidence. [See, Kaplan, The Limits of the Exclusionary Rule, 26 Stanford Law Review, 1027, 1050-52 (1974) for a similar proposal.]

We believe that rule-making, training and discipline constitute the most appropriate means for deterring Fourth Amendment violations, and that the emphasis we place on such means is well founded. To justify to you our reliance, I would like to spend a few moments discussing the effectiveness of each of these three components.

Rules and Regulations

The exclusionary rule, insofar as it was justified as a deterrent to police misconduct, was designed to ensure police conformance with constitutional requirements. In some agencies, however, the officer rarely learns of or understands the reasons for the exclusion of evidence, so the sanction fails in such instances to fulfill its objective. It can even be said that the rule has inhibited proffering of effective guidance to police officers: judicial reliance on and belief in the efficacy of the rule have led to the development of intricate, little understood rules of constitutional procedure and, regarding responsibility for officer direction, have diverted attention from police management to the judiciary, though the judiciary does not have a clear understanding of the daily operations of police agencies.

Administrative rule-making, from which would flow policies, procedures, and rules and regulations for structuring and controlling police conduct, has been advocated by numerous prestigious organizations and prominent spokespersons, some of which include the following: the American Bar Association [ABA Project on Standards for Criminal Justice, Standards Relating to the Urban Police Function §6.2 (1976)]; The National Advisory Commission on Criminal Justice Standards and Goals [Report of the Task Force on Police, §1.3, Commentary (1973)]; The National Advisory Commission on Civil Disorders [Report, 310-11, 314 (1968)]; Chief Justice Warren Burger [Who Will Watch the Watchmen, 14 American University Law Review 1 (1976)]; Kenneth Culp Davis [Discretionary Justice-A Preliminary Inquiry (1971); Frank Remington, Herman Goldstein [Policing In a Free Society (1977)]; and Anthony Amsterdam [Perspectives on the Fourth Amendment, 58 Minnesota Law Review 349 (1974)]. In addition, the courts have frequently suggested the need for such rules. See, e.g., Delaware v. Prouse, 440 U.S. 648 (1979); Brown v. Texas, 443 U.S. 47 (1979); Dunaway v. New York, 442 U.S. 200 (1979); and South Dakota v. Opperman, 428 U.S. 364 (1976). Some police departments have attempted to develop and implement such rules, among which departments are the following: Boston, Massachusetts; Madison, Wisconsin; and Washington, D.C. The rules provide clear, affirmative guidance to officers as to how they may proceed in a wide variety of complex situations; such rules contrast court decisions that restrict discussions to what an officer cannot do and are rendered in a manner not usually understood by police

officers. These rules address such procedures as execution of search warrants, searches incident to arrest, motor vehicle searches, stop and frisk, and eyewitness identification.

The incorporation of administrative rule-making into our alternative procedure provides several advantages over the exclusionary rule, given the rule's current application. Courts would first focus on the procedures required by the rules and, second, on the past conduct of individual officers. This would redirect judicially-imposed responsibility for constitutional violations from officers to police administrators. Police officers, as with employees of any organization, are more likely to adhere to rules established by their agencies than to rules imposed from without by the courts. Developing clear, precise directives that are free of the legal terminology contained in many court opinions and that are written in language more easily understood by police officers could make the rules easier to understand and more likely to be followed.

Administrative rule-making would exert a broader influence on police operations than the exclusionary rule; its use within constitutional restraints would help in an array of law enforcement operations because police expertise would be utilized systematically and continuously. Judges, who lack law enforcement expertise, promulgate rules through an adversary process whose sole focus is on particular facts unique to individual cases. By contrast, police administrators, who understand the realities of police behavior, are able to fully grasp

the implications of promulgated rules for all law enforcement needs. In developing rules, administrators would be able to utilize procedures best suited to the realities of law enforcement, while remaining within the confines of constitutional requirements. In addition, because many police activities are currently unregulated by the courts, i.e., activities not directed toward gathering evidence or leading toward prosecution, rule-making can lead to full definitions of rights of criminal suspects and other persons coming in contact with police. Finally, the visibility of the rule-making process would compel police administrators to make conscious assessments of law enforcement practices insofar as the practices relate to constitutional and other legal requirements and would make administrators more accountable for decisions that should be based on such assessments.

The development of administrative rules regarding police procedure would have tremendous impact in helping to control police misconduct and in preserving constitutional values. Departmental rules governing activities of officers would be applauded by street officers; the rules would free officers from the vague and clouded language of court opinions; officers could look to police guidelines that set specific bounds of conduct. The courts could find either that officers were in violation of their departments' procedures or, in some instances, that the procedures at issue were unconstitutional, thereafter requesting that departments revise such procedures so that they meet constitutional requirements.

Police Training

Development of extensive rules guiding constitutional behavior will have little value if officers are not apprised of them. Publication of the rules, though an important first step in communication, is not sufficient. Officers must be taught how, and the circumstances under which, they may invoke police procedures. Training programs should be devised in such a manner that officers acquire not only the substantive information contained in departmental rules but also insight into ways in which they may, within constitutional limits, proceed with their tasks. The need for training is not limited only to police recruits. Continual revision of regulations, reflecting refinements in constitutional requirements, will necessitate that police officials develop in-service programs to re-train their officers in accordance with changes that are made. Finally, remedial training programs should be designed to reinforce proper procedures for those officers who have violated rules in the past.

Strict Police Discipline

Deterring unconstitutional violations requires that officers be made aware that illegal behavior will not be tolerated; to make this known, an effective system of discipline must be instituted. Though precise rules and regulations are essential to defining kinds of behavior that will be subject to discipline, rules alone are insufficient. If rules are not properly enforced, their objective to conform

police behavior to the provisions of the Constitution will not be achieved. A comprehensive system of internal police discipline, administered fairly and effectively, will promote observance of the rules.

Regarding deterrence, punishing officers for improper conduct has several advantages over the current exclusionary rule sanction. First, because of the relative immediacy and personal nature of disciplinary actions, officers would generally be aware that their conduct was in violation of constitutional requirements; given how the exclusionary rule is applied today (and depending on the agency), officers might not learn of or understand a court's rationale for excluding evidence; in any event, they would not be affected personally. Second, the publication of clearly defined rules, of penalties for violating them, and of the ramification of the disciplinary process would make it clear to the entire police force, as well as to the community, that certain behavior will not be tolerated. Third, police officer aversion to disciplinary action would cause officers to conduct themselves according to proper procedures. Fourth, a system of discipline could introduce the concept of gradations of improper behavior. The exclusionary rule operates uniformly and imposes an inflexible penalty for all violations, minor or major. An effective disciplinary system could apply a variety of penalties tailored according to the seriousness of misconduct. Finally, sanctions that result from enforcement of rules

and regulations could be applied with much greater frequency than the exclusionary rule sanction; only a small percentage of investigations, searches, arrests and interrogations now reach the trial stage.

Why the Alternative Process Proposed by the Forum Is the Most Effective Method to Deter Fourth Amendment Violations

The alternative the Forum proposes is a complete package that must be viewed as a whole: the components are interweaved; each one complements the others; implementation of one component alone will provide neither an adequate substitute for the exclusionary rule nor relief from the problems currently surrounding the rule's use.

The key to the Forum's alternative is placing with police administrators responsibility for ensuring police officer compliance with constitutional requirements. Internal regulation is the most effective means by which police misconduct can be deterred. Police managers, as opposed to persons outside the agency, have greater understanding of police officer behavior and of the culture of the law enforcement community and are, therefore, more effective in causing officers to understand and comply with constitutional procedures.

If police departments realize that their efforts are to be rewarded by the admission during trials of evidence that might previously have been excluded, they will be strongly motivated to formulate rules and to institute training and discipline. Departments that

develop rules and regulations in compliance with the Constitution will not be restrained by the straitjacket of suppression motions. An objective test for determining whether or not departments have developed internal regulatory mechanisms to deter police violations will be applied by the courts. Judges will simply look to departments' good faith efforts to establish effective rules and to institute training and disciplinary systems, allowing evidence into courtrooms if departments pass the objective test. In effect, the court will be turning over to police departments the responsibility for disciplining police officer misconduct, while holding departments responsible for their policies on constitutional rights.

The procedure for determining whether or not the exclusionary rule would be applied in an individual case involves the following steps:

1. If a department has a rule governing the practice under court scrutiny, which rule is found to be constitutional, and if an officer complied with the rule, the evidence obtained as a result of the procedure would be admitted in the case.

2. If an officer fails to comply with a department's constitutional rule, and if the department has a history of disciplining its officers for violations, the evidence would likewise be admitted. Under such circumstances, the officer would be disciplined directly by the department rather than indirectly by the court.

3. If a rule is found to be unconstitutional, the court would look at whether or not the rule was promulgated in good faith and in the reasonable belief that it complied with constitutional requirements. Furthermore, if a department has a history of training and

> disciplining its officers for violations, that department would merely be required to re-promulgate its rule according to proper procedures, deterring future violations while providing the benefit of use of the evidence in the immediate trial. If a department failed to meet these tests, the evidence would be excluded from the trial.

To provide an example of how this process would operate in an actual case, I will use the facts of the case United States v. Adams, 621 F.2d 41 (1st Cir, 1980). In that case, FBI agents had information regarding the possibility that an escaped murderer was living in the house of a former cellmate. This information was corroborated on a Wednesday by a social worker who had visited the residence. On Thursday at 8:30 a.m. the agents again questioned the social worker to see if the escaped convict was still there and found out she was. At 9:50 a.m., seven FBI agents went to the house and, after searching the premises, arrested the fugitive without having obtained either an arrest or a search warrant.

In the trial of the former cellmate for harboring a fugitive, the court excluded the evidence that the fugitive was there. The court found that there were no exigent circumstances to justify a warrantless arrest or search, stating there was ample time to obtain a warrant.

As in the case of an officer's entry into the home of a suspect to make an arrest, the court found that, absent exigent circumstances or without consent, the Fourth Amendment requires that a

police officer must obtain a search warrant before entering the home of a third party to execute an arrest warrant. Thus, under the exclusionary rule as it currently operates, the evidence was excluded from the trial because of the FBI agents' failure to abide by the Fourth Amendment requirements.

Assuming for the moment that the Forum's proposed process were in place, the evidence in this case would not necessarily be excluded. The court would first find out whether or not the FBI had promulgated a rule covering an arrest in the home of a third person, i.e., whether or not a search warrant should first have been obtained. If the court found that the FBI had no rule, the evidence would be excluded. The Bureau, having failed to carry its responsibility for deterring constitutional violations by promulgating a rule, would be responsible for the possible lost prosecution were the evidence to be excluded.

If, however, the court found that the FBI had a rule calling for a search warrant in these circumstances and that the agents violated it, the court would ask the following two questions:

1. Does the FBI conduct a program to train its agents to follow the appropriate procedures for searches and seizures as outlined in its periodically updated rules?

2. In the past, has the FBI disciplined those officers who were found to have violated its search and seizure rules?

If the answers to these questions were, yes, the court would admit the evidence into the trial, stating for the record its reasons for doing so; the FBI would be found to have carried its responsibility for deterring agent misconduct; FBI-imposed discipline would have supplanted the utility of the exclusionary rule as the rule is currently applied.

Advantages of Internal Regulation Required in the Process Proposed by the Forum

In our alternative, the focus of attention shifts from individual officers to police departments. If departments make good faith efforts to define and enforce constitutional behavior, evidence resulting from investigations should not be suppressed. Use of evidence gathered in criminal proceedings will restore the confidence of the police and the public in the criminal justice system. A balance between rights of criminal suspects to be protected from intrusive police behavior and rights of citizens to be protected from criminal acts will be restored.

Once implemented, our comprehensive approach to handling constitutional violations by police officers should prove to be the most appropriate substitute for the exclusionary rule. Placing responsibility for constitutional violations on police administrators is the most logical method for deterring police misbehavior: rules and regulations will provide effective guidance to officers, while strict internal

disciplinary procedures will ensure that discipline is more frequently applied than is now possible under the exclusionary rule. With clear departmental rules there will be less question as to when officers are in the wrong so that administrators will feel more comfortable in applying discipline. Regarding punishment, our system will allow for distinguishing gradations of violations. The development of explicit, comprehensive rules and regulations by police departments will provide a way of clearly spelling out the meaning of constitutional requirements, taking into account the realities of law enforcement practices. The introduction during trials of evidence that might previously have been excluded will increase chances that criminals will be brought to justice. The focus of the trial will shift back to alleged wrongdoings of defendants, increasing the likelihood of swift and certain punishment for criminal activity. The police and the public's respect for the law and the criminal justice system will increase; and what is most important, citizens will be protected, before the fact, from illegal police conduct in all areas of law enforcement activities--even those areas not involving evidentiary matters--because of the deterrent effect of this approach.

Gradual Replacement of the Exclusionary Rule

Incorporating the three components of rule-making, training and discipline into a single, comprehensive alternative can lead to

eventual replacement of the exclusionary rule, eliminating the problems the rule has engendered. Immediate implementation of our alternative will provide partial relief from the exclusionary rule's disadvantages and, eventually, could completely supplant dependence on the rule as a means of deterring unconstitutional police behavior; use of the exclusionary rule, however, will continue until our alternative has proved itself worthy. Determining when to apply the rule will, nevertheless, become easier; using an objective test for determining departments' good faith efforts will simplify the rule's use. Only after our alternative has been proven to be an effective substitute for the rule will the rule be discontinued. In effect, the exclusionary rule simply will atrophy.

The exclusionary rule is an integral part of the Forum's alternative. The prospect of its elimination is an incentive for police departments to develop effective controls over unconstitutional behavior of officers. Use of the exclusionary rule as an incentive to develop internal regulation of unconstitutional behavior is similar to use of the bail-out provision in the Voting Rights Act extension. Under the bail-out provision, if a jurisdiction remains free from discriminatory violations for ten years, it will no longer be subjected to pre-clearance by the Department of Justice for its changes in election procedures. Similarly, under our proposed procedure, if a police department demonstrates a pattern of good faith efforts to deter

unconstitutional behavior, it will be freed from the constraints of the exclusionary rule.

As experienced law enforcement executives, we firmly believe that internal regulation of law enforcement practices is the best possible approach to deterring unconstitutional violations. We are not, however, unrealistic: our belief must not lead to overconfidence. Though the measure of professionalism in law enforcement has increased remarkably over the years since the Mapp decision, many more improvements must be made. The process of improvement will necessarily be gradual. At first, most police departments could not fully meet changed standards without making extensive changes. Developing rules and regulations for conforming police conduct to constitutional safeguards will be a monumental task. Some departments will have to restructure their disciplinary systems extensively.

Nontheless, police departments will gradually adopt extensive and comprehensive rules regarding constitutional procedures and will begin to take appropriate disciplinary action against officers who violate these rules. Some departments will initiate these modifications on their own; others will do so under pressure from prosecutors, the media and the public to lift the burden of the exclusionary rule.

Disadvantages of other Proposed Alternatives to the Exclusionary Rule

Though the underlying philosophy of current proposals to modify or abolish the exclusionary rule is that something must be

done about the current operation of the rule, we believe that none of these proposed alternatives will provide an effective solution to the problem. Before commenting on these proposed alternatives, however, one cautionary note should be raised: the ill effects of the rule should not be confused with the restrictions imposed by the Constitution. It is often argued that the rule handcuffs police in enforcing the law. It is not the rule but, rather, the Constitution itself that quite properly creates obstacles for overzealous police officers. The increased judicial scrutiny that followed the rule's introduction has created for some, the illusion that, if the exclusionary rule were abolished, many of the constitutional restrictions imposed on police would also be abolished. This is a gross misconception: abolishing the current rule would not do away with the constitutional provisions prohibiting illegal search and seizure. The fundamental principles of the Constitution must, of course, be preserved. An alternative's only function is to change the remedy used when violations occur, while providing a mechanism that promotes police adherence to constitutional requirements.

Provision of Civil Remedies

The primary goal of this alternative is to deter constitutional violations by providing for use of a civil damage action against

both the police officer and the government. Though well-intentioned, we believe this alternative will fail in practice. Like current civil remedies, we believe such a damage remedy will be mainly illusory. There are several reasons for this. First, few suits, especially in comparison to the number of violations, will likely be brought: bringing and maintaining a civil action is expensive, burdensome, and time consuming. Currently, overcrowding of court dockets delays the hearing of federal court cases by an average of 13 months and the hearing of state court cases by up to seven years. Victims of illegal practices, who are not themselves involved in criminal behavior, would consequently have less incentive to challenge the police than criminal defendants. Bringing suit would consume a vast amount of a plaintiff's time and could lead many to believe it would not be worth the effort. The infrequent bringing of such suits would result in less judicial review of police practices and, what is more, less guidance for police.

Second, often the only witnesses to an event are the plaintiff and the defendant officer; in such instances the issue becomes one of credibility. Because juries tend to be sympathetic toward police officers confronted with liability, awards against the police might be infrequent. Third, for those plaintiffs who do prevail, compensation will likely be pathetically meager. Because the measure of damages will be the extent of physical injury to the plaintiff or to property, the careful officer could avoid all but nominal damages. Fourth, the damage remedy provides little direct incentive for police to develop

internal rules. The deterrent effect would amount to little more than what is already provided by the rule applied today.

Though a new damage remedy might serve better to compensate victims of constitutional violations than current civil remedies, it would not satisfactorily replace the exclusionary rule. Because such civil actions would be infrequently brought, they would not serve to systematically highlight police misconduct. More importantly, the remedy comes after the fact of the violation; it does not provide adequate incentives for establishing means of deterring misconduct before it occurs.

Elimination of "Good Faith" Efforts from the Exclusionary Rule Sanction

The thrust of this alternative is to limit the application of the exclusionary rule to those instances in which it is believed that individual police officers will be deterred by its application. A similar purpose is found in the recommendation of the Attorney General's Task Force on Violent Crime to exclude "good faith" efforts from the rule. The rationale behind this proposed alternative is that, when a police officers make reasonable, good faith efforts to comply with the law but unintentionally fail to do so because of minor technical violations, it is difficult to find any deterrent effect in suppressing the evidence that was wrongfully obtained; under such circumstances, excluding the evidence from trial has little effect on

officers' future behavior; it merely allows defendants to benefit and undermines public confidence in the criminal justice process. This alternative, though sound in theory, will be cumbersome in practice; its effect will likely be to undermine the deterrent purpose behind the rule, possibly leading to an increase in constitutional violations.

This alternative suggests limiting application of the exclusionary rule to those cases in which it is shown that the officer knowingly intended to violate someone's constitutional rights or when the violation was substantial. "Good faith efforts" by the police officer and "honest mistakes" on the part of the officer would not be subject to exclusionary rule application. The essential component of this alternative is that the exclusionary rule would be applied only when the accused police officer has a specific intent to take away a right which has been established either by the express terms of the Constitution or by decisions interpreting them. Thus, when the officers have known or should have known their conduct was in violation of the Constitution, only then would the exclusionary rule be applied.

Determining how to apply the rule will require an extremely involved fact finding process, irrespective of whether the standard operates on intent, substance or good faith. Judges will be given the difficult task of examining the inner thought processes of officers to determine their true intent. Far from reducing the amount of

fact-twisting that is alleged now to take place during suppression motions, this alternative would promote officer dishonesty regarding what were their true motives for acting. Dependence on discerning the subjective intent of officers would lead to departmental toleration of officer ignorance and would inhibit development of procedures to guide officers regarding proper behavior.

In an attempt to provide an objective measure for determinating the application of the rule under this alternative, its proponents have suggested an added requirement that the officer's good faith belief be reasonable. We believe that such an objective measure is necessary to ensure law enforcement agencies' attention to constitutional requirements. The difficulty lies in the standards by which this reasonableness requirement is to be measured.

Some who advocate this good faith modification have stated that, to meet the reasonable requirement, an officer's police department must have promulgated rules and regulations outlining Fourth Amendment procedures, implemented programs to train the officers in those rules and regulations, and maintain a system for disciplining officers who violate their rules. These statements give us only moderate assurance, however; we are not confident that the judiciary will hold that these same standards are part of the reasonableness requirement. What is needed, instead, is explicit reference in the legislation itself that the test to determine whether an officer's good faith belief is reasonable depends upon whether the officer's

department has a program consisting of the three elements: rules, training and discipline. If these three elements are defined in the legislation as the test of reasonableness, then the Forum's objective of placing responsibility for deterring consitutitional violations upon police administrators will be met. Without such detail, we fear the nebulous standard of "reasonable" will be subject to ambiguous interpretation by judiciary. The result may lead to use of a subjective standard alone as the test of good faith. In that event, the focus of the exclusionary rule will remain upon the individual officer; the opportunity to increase law enforcement agencies' attention to proper Fourth Amendment procedures will be lost.

None of the alternatives to the exclusionary rule addresses what we believe is the most important consideration in devising a remedy for Fourth Amendment violations: law enforcement executives' assuming the responsibility for their officers' violations. This is the only way to ensure with certainty that constitutional violations are minimized. What is needed is a means of testing the good faith efforts of department administrators; such efforts are susceptible of objective measurement. Basing a test on individual officers' subjective intent in paticular cases is not likely to prove productive. The Forum-developed alternative includes the necessary means of testing police administrators' good faith efforts. Our substitute process provides for an objective test by which departmental efforts to eliminate unconstitutional behavior can be gauged. Once departments have passed muster under this objective test, the exclusionary rule will not be applied.

Conclusion

As law enforcement executives who are responsible for the actions of our officers, accountable to the public, and answerable to the law, we believe that our alternative will deter constitutional violations by police officers and enhance the effectiveness of the criminal justice system. Under the procedure we propose, replacement of the exclusionary rule would come gradually as the effectiveness of our process was proved, its use would gradually increase. Critics would no longer be able to complain of an artificial rule handcuffing the police in their efforts to fight crime. The key to removing the handcuffs would be placed in the hands of the police themselves. The task of establishing this alternative means of controlling police misconduct would be a time-consuming and arduous one. Judicial hearings on departmental rules, training and discipline systems would be extensive, especially in the beginning. Once the internal control systems were in place in police departments and their effectiveness in deterring unconstitutional behavior by the police was demonstrated, we believe the rewards would prove to have been well worth the effort. The alternative we have devised will best satisfy the primary purposes of the exclusionary rule and most effectively counter problems stemming from the rule's current use. These effects will promote the ends of justice and help to preserve our Constitutional liberties.

ALTERNATIVES TO THE EXCLUSIONARY RULE

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An Analysis Prepared for the Alaska State Senate by

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February 18, 1983

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ALTERNATIVES TO THE EXCLUSIONARY RULE

In recent years the judicially created exclusionary rule has come under increasing criticism. Legislation has been introduced to Congress to substantially restrict the rule and several states have enacted statutes that limit the scope of the exclusionary rule. Perhaps most significantly, the United States Supreme Court recently requested argument on the issue of whether the rule should be inapplicable when a peace officer acts in the reasonable and good faith belief that his conduct is lawful.

The purpose of this paper is to analyze alternatives to the exclusionary rule in Alaska as the rule applies to violations of the fourth amendment.[1] Primary emphasis will be on the proposed "good faith" exception to the exclusionary rule, a form of which is currently before the legislature in SB 49. In order to adequately assess alternatives to the exclusionary rule, it is first necessary to examine the history of the rule and to consider some of the primary objections to its application.

I. HISTORY OF THE EXCLUSIONARY RULE

The fourth amendment to the United States Constitution provides that

> [t]he 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

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[1]While otherwise admissible evidence is also excluded from a criminal trial to protect other constitutional rights, such as a confession obtained in violation of the Miranda requirements, current proposals to modify the exclusionary rule are usually limited to applications of the rule in fourth amendment cases. Nevertheless, the general analysis that is applicable in evaluating the rule in fourth amendment cases can serve as a foundation for considering modifications of the rule as it applies to other constitutionally protected areas.

> by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The companion section in the Alaska Constitution, Article I, section 14, is identical to the federal provision except that it refers to a person's right "to be secure in their ... houses and other property, papers and effects ..." (emphasis added). Neither the fourth amendment nor the companion Alaska provision[2] provides for a remedy in the event of an unreasonable search and seizure. Nevertheless, in 1914 the United States Supreme Court held that evidence seized in violation of the fourth amendment of the federal constitution is inadmissible in a federal criminal prosecution. Weeks v. United States, 232 U.S. 383 (1914).

In Wolf v. Colorado, 338 U.S. 25 (1949), the United States Supreme Court refused to require the states to apply the exclusionary rule in state criminal prosecutions. The court cited "equally effective" alternatives to the exclusionary rule, including civil lawsuits, disciplinary actions and criminal prosecutions. The court noted that the exclusionary rule was not required by the "explicit requirements of the Fourth Amendment" but was rather "a matter of judicial implication." Twelve years later, however, in the landmark case of Mapp v. Ohio, 367 U.S. 643 (1961), the court overruled Wolf and imposed the exclusionary rule on the states.

Before statehood it was established law in Alaska that the exclusionary rule applied in cases where evidence was seized in violation of the fourth amendment. Ellison v. State, 383 P.2d 716 (Alaska 1963). With the Supreme

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[2]Hereinafter, unless otherwise specified, all references to either the fourth amendment of the United States Constitution, or Article I, section 14, of the Alaska Constitution will be made by reference to the "fourth amendment."

Court's decision in Mapp in 1961, Alaska state courts were required to apply the exclusionary rule. Despite the federal requirement, the Alaska Supreme Court has suggested that even if Wolf had not been overruled, it would have adopted the exclusionary rule as a matter of state constitutional law. Ellison v. State, 383 P.2d 716, 718 n. 6 (Alaska 1963).

The Alaska Supreme Court has adopted the exclusionary rule as part of the Alaska Rules of Evidence. Rule 412 provides, in pertinent part, that "evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose...." The entire text of Rule 412 appears as appendix A.

In State v. Sears, 553 P.2d 907, 911-12 (Alaska 1976), the Alaska Supreme Court summarized the two rationales behind the exclusionary rule.

> One of those rationales is the deterrence of unconstitutional methods of law enforcement. The other rationale is the imperative of judicial integrity which requires that the courts not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of fruits of such invasions.

Id. 911-12

The Alaska Supreme Court has recognized that the primary purpose of the exclusionary rule is to deter illegal police conduct. State v. Sundberg, 611 P.2d 44, 51 (Alaska 1980). Considering that purpose, the court has refused to apply the exclusionary rule in cases where it might have some, but minimal deterrent effect (State v. Sears, 553 P.2d 907, 912 (Alaska 1976)) or when other effective deterrents are available (State v. Sundberg, 611 P.2d 44 (Alaska 1980).

The Alaska Supreme Court, however, has noted on several occasions that the Alaska Constitution's guarantee against unreasonable searches and seizures is broader than the comparable protection afforded under the fourth amendment of the United States Constitution. Zehrung v. State, 569 P.2d 189 (Alaska 1977); Woods & Rhode, Inc. v. State Dept. of Labor, 565 P.2d 138 (Alaska 1977); Ellison v. State, 383 P.2d 716, 718 (Alaska 1963). In part this conclusion is based on the slightly different wording of the Alaska and federal amendments. Of greater significance, however, is the fact that the Alaska constitution contains a specific provision recognizing "the right of the people to privacy" and requiring the legislature to enact legislation to implement that right. Alaska Constitution, Article I, sec. 22; Woods & Rhode, Inc. v. State Dept. of Labor, 565 P.2d 138, 148 (Alaska 1977). A key component of the right to privacy would include the right to be free from unreasonable searches and seizures, particularly in the home.

II. CRITICISMS OF THE EXCLUSIONARY RULE

We will now consider two of the primary criticisms of the exclusionary rule: that it does not deter police misconduct and that it frees the guilty.

A. Does the Rule Deter Police Misconduct?

Perhaps the most frequent criticism of the exclusionary rule is the contention that it does not accomplish its primary goal: the deterrence of unlawful police conduct. In Bivens v. Six Unknown Named Agents, 403 U.S. 388, 417 (1971), for example, Chief Justice Burger in a dissenting opinion noted that the rule fails because police "do not have the time, inclination, or training" to grasp the fine points of appellate opinions and since the rule

does not impose direct penalties on the officer, and police agencies infrequently impose administrative sanctions for the majority of fourth amendment violations, the rule has little deterrent effect.

To date, researchers have been unable to determine with any certainty whether the rule actually has a deterrent effect. United States v. Janis, 428 U.S. 433, 450 n. 22 (1976). The Alaska Supreme Court, for example, has noted that there has been considerable inconclusive debate on whether the rule deters police misconduct. State v. Sundberg, 611 P.2d 44, 51 n. 20 (Alaska 1980).

The lack of empirical data to establish the deterrent effect of the rule was in fact anticipated by the United States Supreme Court. In Elkins v. United States, 364 U.S. 206, 218 (1960), the court recognized that "it is hardly likely that conclusive factual data could ever be assembled" to show the deterrent effect of the rule. Nevertheless, a leading commentator on the fourth amendment has concluded:

> Despite the lack of hard evidence proving deterrence and of a sound quantitative measure of the extent of deterrence, it is not irresponsible to suggest: (i) that the hard evidence the rule does not deter under certain circumstances fails to 'demonstrate the absence of all deterrent potential'; and (ii) that a significant amount of deterrence may be assumed from the fact that conviction of offenders remains obviously an important objective of police activity.

1 LaFave, Search and Seizure, note 38, § 1.2(b) (1978) (quoting Allen, Federalism and the Fourth Amendment; A Requiem for Wolf, 1961 Sup.Ct.Rev.1, 33).

Even after concluding that the exclusionary rule is ineffective as a general deterrent, one leading critic has acknowledged that the exclusionary rule may deter misconduct in cases involving serious crimes. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970).

At the minimum the rule may result in increased police appreciation of constitutional rights. Can and Egbert, The Exclusionary Rule: Its Necessity in Constitutional Democracy, 23 Harv. L. J. 299, 317 (1980). It can also be argued that the rule has a significant deterrent effect by forcing police departments to adopt adequate police training programs to insure compliance with the fourth amendment. See generally, Mertens and Wasserman, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L. J. 365, 394-99 (1981) (hereinafter cited as Mertens.)

Perhaps the more relevant question regarding the deterrent effect of the rule is not the number of illegal searches that occur despite the rule, but rather how many more illegal searches would occur if the rule did not exist, a question that would appear impossible to answer. In Bivens v. Six Unknown Named Agents, 403 U.S. 388, 421 (1971), Chief Justice Burger noted that repealing the exclusionary rule, without providing an effective alternative might cause the police "to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed - that an open season on 'criminals' had been declared."

The lack of empirical data to establish the deterrent effect of the rule has not, however, led to the abandonment of the deterrence rationale.

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.

> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions.

Stone v. Powell, 428 U.S. 465, 492-93 (1976).

One related argument that has been made by those who contend that the exclusionary rule does not deter police misconduct is that it has no effect when an illegal search fails to uncover incriminating evidence. Since the exclusionary rule only suppresses evidence that is discovered as a consequence of illegal police conduct it is acknowledged that the rule "is powerless to deter invasions of constitutionally guaranteed rights where the police have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." Terry v. Ohio, 392 U.S. 1, 14 (1968). Nevertheless, in these cases the rule could be supplemented by other deterrent measures, including criminal prosecution of the offending officer or internal disciplinary actions.

Perhaps the most persuasive argument in support of the criticism that the rule does not deter police misconduct applies in cases when an officer makes an honest error of judgment but nonetheless acts reasonably and in the good faith belief that his conduct is lawful. While it may be possible to deter intentional and flagrant violations of constitutional rights, can honest and reasonable, but later determined improper, police activity be successfully deterred? We will return to the question when we consider the "good-faith" exception to the exclusionary rule.

B. The Rule Allows the Guilty to Go Free.

The criticism that the exclusionary rule allows the guilty to go free was recently concisely summarized by the district attorney for Los Angeles.

> As a consequence of its implementation, truthful, reliable and probative evidence is kept from the trier of fact in criminal cases. As a result, guilty persons sometimes go free. On occasion, cases are so weakened by the loss of the excluded evidence that a conviction -- if it can be obtained at all — can only be obtained on charges less substantial than those for which a defendant is guilty in fact.

Van de Kamp, The Exclusionary Rule Promises Not Kept - Proposed Alternatives, 15 Prosecutor 348 (1979).

Exclusion of illegally obtained evidence does not automatically result in dismissal of criminal charges. The rule does not prevent prosecution of a defendant who is the victim of an illegal search, but rather prohibits the introduction of evidence that was illegally obtained. If there is other evidence that is free of the "taint" of the illegal search, a conviction may still be obtained. In a study of cases handled in 38 U.S. Attorneys' offices from July 1 - August 31, 1978, it was found that of 2,804 defendants only 11% filed motions to dismiss on fourth amendment grounds. These motions were denied in the overwhelming majority of cases, and in only 1.3% of the 2,804 cases (36 cases) were the motions granted. Over half of the defendants whose motions were granted were convicted despite the suppression of some relevant evidence. During the same period only 0.4% of cases that the U.S. attorney declined to prosecute were based on fourth amendment grounds. Impact of the Exclusionary Rule on Federal Prosecutions. Report of the Comptroller General, April 19, 1979.

A study of the effect of the exclusionary rule on criminal prosecutions in California conducted by the National Institute for Justice reached different conclusions than the federal study. The study was based on three classes of data: a statewide review of felony cases rejected for prosecution because of search and seizure problems for the years 1976-1979, all felony cases rejected in San Diego County in 1980, and a sampling of those rejected in Los Angeles County in 1981.

> The report concludes first that 'the exclusionary rule does appear to be an important factor in the processing of state felony cases. The analysis of California data reveals that almost 5 percent of felony rejections statewide and an even larger proportion in large urban areas -- up to almost 15 percent in one office in Los Angeles — were rejected for search and seizure problems.' For the most part, the data on case rejection come from prosecutorial decisions. However, the report also discusses a special study on initial police screening; that study, conducted by the San Diego Police Department in 1981 showed that approximately 130 persons, six percent of all arrestees, were released because police perceived a search and seizure problem in the case.

32 Crim. L. Rep. 2327

Statistics similar to the federal and California studies are not available for prosecutions in Alaska state courts. It might reasonably be expected, however, that the comparable percentages in Alaska would be similar to those in the California study because of the Alaska Supreme Court's expansive interpretation of the fourth amendment.

Despite the uncertainty about the number of cases that are "lost" because of the exclusionary rule, it can be concluded that even if only one otherwise guilty defendant escapes conviction because of police misconduct,

the exclusionary rule suppresses the truth by excluding highly probative evidence from trial. One commentator has responded to this criticism in the following manner:

> This criticism reaches the heart of the justification for trials. It may be countered by arguing that trials are not a good method for determining facts, and that good reasons generally support limitations on the truth-determining ability of trials. Furthermore, trials, particularly criminal trials, serve several functions besides truth-finding, including catharsis and reinforcement of community morality. The exclusionary rule might then just be cited as another limitation compromising the discovery of truth for other important social goods.
>
> Finding and basing judicial decisions upon the truth and controlling the uses of official force to protect civil liberties are equally important values, but in operation they conflict. Truth-finding is compromised, to some extent, so that police may be controlled. The exclusionary rule reflects the struggle to resolve these competing values.

Goodpaster, An Essay on Ending the Exclusionary Rule, 33 Hastings L.J. 1065, 1067 (1982).

III. IS THE PRESENT EXCLUSIONARY RULE CONSTITUTIONALLY REQUIRED?

With the single exception of Mapp v. Ohio, 367 U.S. 643, 656 (1961), where a plurality of the Court referred to the "constitutionally necessary exclusion doctrine", a majority of the United States Supreme Court has never held that the fourth amendment by itself requires the suppression of illegally obtained evidence. The Court has instead emphasized the two justifications for the rule: the "imperative of judicial integrity" and the deterrence of illegal police conduct.

In almost every major exclusionary rule case since Mapp, the deterrence rationale has received prime attention in determining whether to apply the exclusionary rule to particular forms of police conduct. In Terry v. Ohio,

392 U.S. 1, 14 (1968), for example, the Court emphasized the deterrent purpose of the rule but recognized that this purpose rendered the rule useless against "invasions of constitutionally guaranteed rights when the police ... have no interest in prosecuting." Similarly, in Desist v. U.S., 394 U.S. 244, 254 n. 24 (1969), the Court refused to "extend the court made exclusionary rule to cases in which its deterrent purpose would not be served." In more recent cases the Court has emphasized that it is concerned solely with whether application of the exclusionary rule will deter police misconduct. In deciding whether to extend the exclusionary rule the Court has adopted a balancing test that weighs the possible deterrence resulting from application of the rule against the cost of excluding the evidence. See e.g., U.S. v. Calandra, 414 U.S. 338 (1974).

In United States v. Janis, 428 U.S. 433 (1976), the Court refused to apply the exclusionary rule to suppress evidence unconstitutionally seized by a state officer that was to be used in a civil proceeding. Justice Blackmun concluded that since the evidence was already inadmissible in state and federal criminal proceedings, only marginal deterrence would result from excluding the evidence in a civil action. It was also in Janis that the Court defined the judicial integrity rationale for the exclusionary rule in a way to effectively include it under the general deterrence rationale:

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution.... The focus therefore must be on the question whether the admission of the evidence encourages violaters of fourth amendment rights. As the court has noted in recent cases, the inquiry is essentially the same inquiry into whether exclusion would serve a deterrent purpose.

Id. at 458, n. 35

The Alaska Supreme Court has applied a similar analysis in deciding whether to extend application of the exclusionary rule. In Sears v. State, 553 P.2d 907, 912 (Alaska 1976), the court considered whether the exclusionary rule should apply in probation revocation proceedings.

> An analysis of the deterrence goal of the exclusionary rule and its relation to Alaska's system of probation is appropriate here. This court must answer the question whether extension of the exclusionary rule to probation revocation hearings would further the goal of deterrence (of unlawful methods of law enforcement) sufficiently to outweigh the need for use of the evidence thus secured to promote the enforcement of a rational probation system. Theoretically, any time illegally seized evidence is excluded, the deterrent impact of the exclusionary rule is presently administered is incremented. However, invocation of the exclusionary rule in probation revocation proceedings would yield only a minimal additional deterrent effect which is outweighed by the needs of our probation system.

Similarly, in State v. Sundberg, 611 P.2d 44, 51-52 (Alaska 1980), the court considered whether any other effective sanctions would deter the use of excessive force by police officers in making an arrest.

> The primary purpose of the exclusionary rule is deterrence of future illegal conduct by the police. Assuming that application of an exclusionary rule would provide some disincentive to the use of unlawful force by police officers in making arrests, the question which remains is whether other deterrents render adoption of an exclusionary rule unnecessary given society's interests in the apprehension, prevention, and trial of offenders. Potential deterrents exist in the possibility of criminal sanctions; police departmental proceedings; civil rights actions; and common law tort suit against the offending officer. On the record in this case we are not persuaded that these deterrents are so ineffective that invocation of an exclusionary rule is the only viable alternative.

Considering the Court's frequent observation that Alaska's constitution provides greater protection from unreasonable searches and seizures than the federal constitution and the specific constitutional protection of the right

to privacy in Alaska, it is probable that the Court would uphold a modification of the exclusionary rule only if it deterred police misconduct as effectively as the current rule. While the existing formulation of the exclusionary rule in Evidence Rule 412 is unlikely to be viewed as constitutionally mandated, any fundamental change must be at least equally effective in protecting the constitutional rights of Alaskans to privacy and to be free from unreasonable searches and seizures.

IV. THE "GOOD FAITH" EXCEPTION.

In recent years there has been considerable support for modifying the exclusionary rule to prevent its application when an officer acts in a reasonable good faith belief that he is acting lawfully. In his dissent in Stone v. Powell, Justice White argued that good faith conduct by police officers should prevent application of the rule, even though the fourth amendment may have been violated.

> [T]he rule should be substantially modified so as to present its application in these many instances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for his belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectations that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed.

Stone v. Powell, 428 U.S. 465, 538 (1976), (White, J. dissenting).

In Stone v. Powell, Chief Justice Burger proposed limiting the exclusionary rule "to egregious, bad-faith conduct," or else "overruling this judicially contrived doctrine entirely." Id. at 501. Justice Rehnquist has argued that "[i]f the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only

if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional." Robbins v. California, 101 S.Ct. 2841, 2851 (1981). In Brown v. Illinois, Justice Powell stated that

> [t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence.

Brown v. Illinois, 422 U.S. 590, 612 (1974) (Powell, J., concurring in part).

The newest member of the United States Supreme Court, Justice O'Connor, may bring to five the number of justices who are willing to restrict application of the exclusionary rule in cases involving good faith conduct. At her confirmation hearings she stated that she had concluded that the exclusionary rule "sometimes interfered with the administration of justice by requiring the exclusion of evidence obtained through a technical error." N.Y. Times, Sept. 11, 1981, at 9, col. 3.

The Alaska appellate courts have never considered the merits of a good faith exception to the exclusionary rule. In one recent case involving an officer's good faith belief that he had consent to conduct a search, the Court, however, included dicta which can be used to support adoption of a good faith exception.

> Moreover, the exclusionary rule imposed where the fourth amendment is violated is thought to operate to deter police from unreasonable searches and seizures. Obviously, there can be no deterrent effect where the police believe that they are acting reasonably and lawfully and it is only by a hindsight determination that actual authority is found to be wanting.

Nix v. State, 621 P.2d 1347, 1349-50 (Alaska 1981).

On the legislative front, in early September, 1982, President Reagan sent Congress a bill entitled the "Criminal Justice Reform Act of 1982" (S 2903; HR 7117). Among other things, the bill calls for a change in the exclusionary rule to establish a "good-faith exception" which would allow for the admission of evidence resulting from a search or seizure "undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment." The Reagan proposal was based on a recommendation made in the Attorney General's Task Force on Violent Crime, Final Report 55 (1981). The full text of the President's exclusionary rule proposal is included as Appendix B.

On the state level, both Arizona and Colorado have recently adopted good faith statutory exceptions to the exclusionary rule. The Arizona statute, Ariz. Rev. Stat. Ann. § 13-3925 (1982), is included as Appendix C and the Colorado statute, Colo. Rev. Stat. § 16-3-308 (1981) as Appendix D. In Alaska, a bill based on the Arizona and Colorado statutes was introduced this session as SB 49, which is included as Appendix E.

Perhaps the most significant development in what appears to be a growing movement toward adoption of a good faith exception to the exclusionary rule came in early December, 1982, when the United States Supreme Court requested supplemental argument in a case involving application of the exclusionary rule, Illinois v. Gates, 423 N.E.2d 887 (Ill. 1981), cert. granted, 32 Crim. L. Rep. 4023. The Court requested the parties to address the issue of "whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the fourth amendment, ... should to any extent be modified, so as, for example, not to require the exclusion of evidence

obtained in the reasonable belief that the search and seizure at issue was consistent with the fourth amendment." 32 Crim. L. Rep. 4105. While the decision to request argument on this issue does not necessarily mean that a majority of the Court is willing to adopt a sweeping good faith exception to the exclusionary rule, it is safe to conclude that there is now substantial support on the Court for at least a limited modification of the rule.

The leading case recognizing a good faith exception to the exclusionary rule is United States v. Williams, 622 F.2d 830, 846-47 (5th Cir. 1980) (en banc) cert. denied, 449 U.S. 1127 (1981), where the court held that "when evidence is sought to be excluded because of police misconduct leading to its discovery," the evidence should be admitted when the conduct, even if "mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper." The Court concluded that the rule should not apply "in those contexts where it does not effectively deter official misconduct." As an example, the Court cited "improper police actions taken in reasonable good faith" because "it makes no sense to speak of deterring police officers who acted in the good faith belief that their conduct was legal by suppressing evidence derived from such actions unless somehow we wish to deter them from acting at all." Id. at 842.

There are generally two types of "good faith" violations. United States v. Williams, Id. at 831; Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 Crim. L. & C. 635 (1978). The first is where an officer misinterprets available facts and conducts a search without probable cause or without a warrant and can be referred to as the "good faith mistake". The second is sometimes referred to as the "technical violation" (See e.g., Brown v. Illinois, 422 U.S. 590, 611 (1975)

(Powell, J., concurring in part) and Stone v. Powell, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring) and applies to situations where an officer acts pursuant to a statute, a warrant or a court decision that is subsequently overturned.

One commentator has summarized the early history of the good faith exception, emphasizing that its underpinnings are derived from recognition of deterrence as the prime rationale for the exclusionary rule.

> The victory of the deterrence rationale created a logical basis for excepting from the operation of the rule evidence obtained by officers who believed they were acting legally. As the Supreme Court has stated, the deterrence rationale for the exclusionary rule necessarily assumes that the police have engaged in willful or at least negligent conduct, and therefore has little force when the police acted in complete good faith.
>
> Once the deterrence rationale of the exclusionary rule was firmly established, proponents of the good faith exception slowly began to emerge. Judge Friendly first proposed the good faith exception in a 1965 speech in which he contended that imposing the maximum penalty of exclusion for every error of judgment, however excusable, was inconsistent with the objective of deterrence. Although Judge Friendly's suggestion generated little immediate response, it became clear in the early 1970's that several members of the Supreme Court were sympathetic to his views.

Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 67 Geo. L.J. 1329, 1415-16 (1981) (footnotes and citations omitted).

A. Specific Applications of the Good Faith Exception.

The three primary areas where it has been suggested that a good faith exception to the exclusionary rule should be applied are where an officer (1) conducts a search or arrest pursuant to an invalid warrant reasonably believed to be valid; (2) conducts a search or makes an arrest relying on a statute or court decision that is subsequently held unconstitutional or invalid; or (3)

conducts a search without a warrant based on a reasonable but mistaken assessment of probable cause. All three circumstances are recognized as exceptions to the exclusionary rule under the recently enacted Arizona and Colorado statutes as well as under SB 49. The scope, effect, and likely constitutionality of each exception will now be considered.

1. Searches Conducted Pursuant to an Invalid Warrant.

One area where the good faith exception to the exclusionary rule may be appropriate is when an officer conducts a search or makes an arrest pursuant to a warrant that is reasonably believed to be proper but is subsequently declared invalid. A peace officer, for example, may conduct an investigation and conclude that sufficient probable cause exists to support the issuance of a search or arrest warrant. The judge who is presented with the request agrees that probable cause exists and issues the warrant. If it is later determined that probable cause did not exist the warrant will be held invalid and all evidence that was obtained under it will be suppressed by application of the exclusionary rule.

This was precisely the situation in Illinois v. Gates, 85 Ill 2d 376, 423 N.E. 2d 887 (Ill. 1981), cert. granted, 32 Crim. L. Rep. 4023, where police officers obtained a warrant to search the defendant's home and car for marijuana based on an anonymous tip from an informer. The Illinois Supreme Court held that even though some of the information contained in the informer's tip had been corroborated by the officers, probable cause did not exist for the warrant and therefore the marijuana that was seized must be suppressed. There was no indication in the record that either the officers or the magistrate who issued the warrant acted other than reasonably and in good

faith. A leading supporter of the view that the exclusionary rule should not apply in circumstances such as presented in Gates is Professor Johnson.

> [T]he exclusionary rule should not apply in cases where the officer's actions were authorized or commanded by a warrant. In other words, where the officer has obtained a warrant, and where he has acted within the scope of the warrant, we would not exclude evidence on the ground that the information before the magistrate did not establish probable cause. What we would do is periodically review the performance of magistrates by going over the files in cases where they issued warrants, and where they declined to issue warrants, to determine if they are exercising their discretion in a responsible manner....
>
> A major goal of this proposed innovation would be to give law enforcement officers some solid encouragement to employ the warrant process for all searches and arrests which are not made on an emergency basis, at the scene of the crime or whatever. For the first time, the officer would have a real incentive not to search his imagination for an exception to the warrant requirement.

P. Johnson, New Approaches to Enforcing the Fourth Amendment, 8-10 (Working Paper, Sept. 1978).

As a practical matter, there is already substantial incentive for a police officer in Alaska to obtain a warrant before conducting a search. In the fifty-two search and seizure opinions between statehood and 1978, the Alaska Supreme Court has never invalidated a search warrant and has clearly stated its policy of favoring resolution of close cases in favor of finding probable cause and upholding the warrant. Feldman, Searches and Seizure in Alaska, 7 U.C.L.A. Alaska L. Rev. 75, 89 (1977). But see, Milne v. State, 607 P.2d 360 (Alaska 1980). A search conducted without a warrant is viewed as being per se unreasonable unless it falls within one of the narrow exceptions to the warrant requirement. Erickson v. State, 507 P.2d 508, 514 (Alaska 1973).

Despite the Court's past practice of not invalidating searches pursuant to warrants, it can be argued that adoption of a statutory good faith exception in this area may have a harmful effect on the warrant process.

> Given the fact that empirical studies have shown that "police 'shop around' for a magistrate who is lenient" and that there is "substantial disparity between magistrates as to how much evidence is required to obtain a search warrant," and that even a leading opponent of the exclusionary rule has "no doubt" that "judges do misconstrue the Fourth Amendment and fudge the standards of probable cause, all in what they consider to be the overall good of justice and the community," I am not sanguine about what would happen if both police and magistrates knew that whatever search and seizure activity was authorized by a warrant could in no way be challenged in a criminal prosecution arising out of that action.

1 LaFave, Search and Seizure, § 1.2 at 4 (1982 Pocket Part) (footnotes and citations omitted).

A good faith exception to the exclusionary rule in cases involving searches pursuant to defective warrants was recently rejected by the Michigan Court of Appeals. The court held that excusing the lack of probable cause on the ground of good faith in such circumstances would, in effect, remove the probable cause requirement from the Fourth Amendment.

> In every case where a constitutionally infirm search warrant was issued, the prosecution could reasonably claim that the police acted in good faith. In effect, the constitutional language that all warrants be issued only on a showing of probable cause would become a nullity. Furthermore, adoption of a 'good-faith' standard would remove the incentive for police officers to find out what sort of police conduct constitutes an unreasonable invasion of privacy. On a police force, efficiency in obtaining convictions is rewarded so recognition of a good-faith exception to the warrant requirement would encourage police officers to remain ignorant of the law in order to garner more evidence and obtain more convictions. The end result, increased illegal police activity, is the very problem that the exclusionary rule is designed to avert.

People v. David, 326 N.W. 2d. 485, 488-89 (Mich. App. 1982).

In assessing the constitutionality of a statutory good faith exception to the exclusionary rule applying to searches and arrests with warrants the Alaska Supreme Court is likely to consider the effect of the modification on deterring violations of the fourth amendment. See § III, supra. In making that determination the Court can be expected to balance two competing factors. On the one hand, the exception will increase the incentive for a peace officer to obtain prior judicial authorization before conducting a search or making an arrest, a prime goal of the Court in assuring compliance with the fourth amendment. On the other hand, some judges who are aware that an erroneous determination of probable cause will not trigger the exclusionary rule may be more likely to find probable cause in cases where it was not present. If it can be established that the positive effect of the exception in encouraging officers to obtain warrants outweighs the negative effect of possibly causing some judges to make improper determinations of probable cause, the Alaska Supreme Court is likely to uphold this limited good faith exception to the exclusionary rule.

2. Searches or Arrests Conducted Under Statutes or Court Decisions That are Subsequently Declared Unconstitutional or Invalid.

There is virtually a unanimous consensus that the exclusionary rule should not apply where an officer conducts a search incident to an arrest for a crime that is subsequently declared unconstitutional. In the leading case of Michigan v. DeFillippo, 443 U.S. 31 (1979), the United States Supreme Court refused to suppress evidence seized incident to an arrest for a crime that was declared unconstitutional after the arrest. The Court held that since the officer had probable cause to make the arrest he had authority to conduct a

search incident to the arrest. The lawfulness of that search was not affected by the subsequent determination that the underlying crime was unconstitutional. It is important to note, however, that the Court was careful to distinguish the circumstances presented in DeFillippo from cases where the statute that authorized the search itself was declared unconstitutional or invalid. In this case the exclusionary rule would apply.

The determination that the exclusionary rule should not apply in cases similar to DeFillippo is found in sec. 12.45.015(b)(4) of SB 49 as well as in the recently enacted Colorado and Arizona statutes. In two significant ways, however, all three formulations conflict with the holdings in DeFillippo and other relevant cases by making the exclusionary rule inapplicable when a search or arrest is conducted pursuant to any law or judicial precedent that is later declared invalid.

In the first place, the Court in DeFillippo was careful to limit its holding to arrests for crimes that were subsequently declared unconstitutional. As previously discussed, the Court stressed that if the statute that authorized the search was unconstitutional the exclusionary rule would apply, even though the statute was declared unconstitutional after the search. The distinction made in DeFillippo can be viewed as one between substantive statutes defining crimes and procedural statutes authorizing an arrest or search. A search incident to an arrest for a substantive crime that is declared unconstitutional will not trigger the exclusionary rule while a search pursuant to a procedural statute that is declared unconstitutional (for example, a statute authorizing searches of dwellings on less than probable cause) will result in application of the rule. Formulations applying the good faith exception in cases where an arrest is made pursuant to an

unconstitutional statute fail to acknowledge the critical distinction made by the United States Supreme Court in DeFillippo between unconstitutional procedural and substantive statutes.

The second way that the proposed good faith exception conflicts with existing law is by its application when a search is conducted pursuant to a judicial decision that is subsequently declared invalid. While the courts have limited application of the exclusionary rule in cases involving retroactive application of a decision arguably in conflict with a prior case, there is no authority for the view that a good faith exception should apply in the particular case that the prior rule is reversed. Cf. Desist v. United States, 394 U.S. 244, 254, n. 24 (1969). A rule applying the good faith exception in these cases would remove the defendant's incentive to challenge the continued validity of a prior decision, since even if the court reversed its prior holding the exclusionary rule could not be applied in the defendant's case. Additionally, this application of the good faith exception appears to conflict with the constitutional requirement that judicial review be confined to actual cases or controversies affecting the rights of the parties. Since a decision overruling a prior precedent would not affect the defendant's case if a broad good faith exception to the exclusionary rule applied, no case or controversy would exist and the court would appear to be without jurisdiction to reverse its prior decision in the context of a motion to suppress evidence.

In attempting to predict how the Alaska Supreme Court is likely to view a good faith exception to the exclusionary rule applicable to searches and arrests made pursuant to statutes or judicial precedents that are subsequently declared unconstitutional or invalid, two conclusions can be made:

(1) A limited exception applying to a search incident to an arrest for a substantive crime that is subsequently declared unconstitutional is likely to be upheld under the reasoning in DeFillippo.

(2) A broader exception applying to arrests and searches authorized by procedural statutes or judicial decisions subsequently declared invalid is likely to be held unconstitutional since it would conflict with DeFillippo, existing retroactivity precedents, and the constitutional restriction on judicial review to cases or controversies.

3. Searches Conducted Without a Warrant.

Another area where it has been suggested that the good faith exception should apply is when an officer conducts a warrantless search reasonably, but erroneously, believing that there is probable cause and that the circumstances justify dispensing with the warrant requirement. This approach is reflected in sec. 12.45.015(b)(2) of SB 49 as well as in the Colorado and Arizona statutes.

The fourth amendment requires that an officer have probable cause to conduct a search or make an arrest. In Chilton v. State, the Alaska Supreme Court defined "probable cause" to arrest in the following manner:

> For probable cause to exist, the facts and circumstances within the officers' knowledge, must be sufficient in themselves to warrant a man of reasonable caution in believing that a crime has been or is being committed. Pistro v. State, 590 P.2d 884, 886 (Alaska 1979); Cruse v. State, 584 P.2d 1141, 1144 (Alaska 1978). More than good faith on the part of the officer is required.

Chilton v. State, 611 P.2d 53, 55 (Alaska 1980) (emphasis added).

Adoption of a good faith exception applicable to determinations of probable cause by a police officer may be based on the mistaken assumption that the concept of probable cause is not broad enough to accommodate reasonable mistakes of fact. Assuming that an officer's conclusions that probable cause exist are reasonable under the circumstances, probable cause will not disappear even though it turns out that those conclusions were mistaken. For example, an arrest will be upheld if the officer reasonably believed, based on the facts available at the time, that he had probable cause to arrest, even though it later was discovered that the suspect had not committed the crime. See, e.g., United States v. Watson, 423 U.S. 411 (1976). The critical issue is therefore how would the Alaska Supreme Court interpret a statute that provides that a reasonable but mistaken belief about the existence of probable cause constitutes an exception to the exclusionary rule, when the term "probable cause" already incorporates a "reasonable man" test?

In reviewing the court's decision in United States v. Williams, 622 F.2d 830, 146-47 (6th Cir. 1980) (en banc) cert. denied, 449 U.S. 1127 (1981), that the good faith exception accommodated factual mistakes by an officer, one commentator has made the following observations that have equal validity in assessing a statute applying the good faith exception to an officer's determination of probable cause.

> [T]he Fifth Circuit could have meant only two things if it intended to exempt from the exclusionary rule evidence that would be otherwise inadmissible. It must have intended either that a test of general reasonableness should replace the specific benchmarks of probable cause, reasonable suspicion, and exigent circumstances, or, at the very least, that evidence obtained in an arrest should be admissible as long as the officer reasonably believed he had probable cause for the arrest, even though he did not. Even this more

> limited reading of the Williams court's good faith exception translates into a fundamental change in fourth amendment standards....
>
> Although the court claimed that a good faith exception does not diminish the protections of the fourth amendment, other evidence suggests that it knew better. As the author of the article upon which the court relied for its definition of the exception candidly admitted in a portion of her article that the court understandably did not quote:
>
> > The good faith doctrine should not be judged by its effect on the exclusionary rule but by its effect upon the standards which define when citizens will be protected against government intrusion. To the extent that probable cause is the key to fourth amendment protections, the good faith exception diminishes the liberality of the fourth amendment.... In other words what is required is no longer "probable cause" as presently defined, but instead a "reasonable ground for belief."

Mertens, supra at 429-309 (footnotes omitted)

It is likely that a good faith exception applicable to warrantless determinations of probable cause by an officer would be held unconstitutional by the Alaska Supreme Court. By effectively diluting the constitutional requirement of probable cause and by possibly insulating erroneous determinations of probable cause from judicial review (See § IV,B,1 infra) this application of the good faith exception may be viewed as sanctioning violations of the fourth amendment.

Adoption of this application of the good faith exception will also weaken the argument in support of an otherwise constitutional application of the good faith exception. As previously discussed (See § IV, A, 1 supra), the good faith exception applicable to a search conducted with an invalid warrant can be held constitutional if the Court concludes that its positive effect of

encouraging officers to obtain warrants outweighs the negative effect of possibly increasing the number of erroneous judicial determinations of probable cause. The simultaneous adoption of a good faith exception applying to warrantless determinations of probable cause, however, will remove the additional incentive for an officer to act with a warrant. This is so because there is always the possibility that a judge reviewing a warrant application will deny the request because the assessment of probable cause by the officer, though reasonable and in good faith, was mistaken. On the other hand, if the officer decides to bypass the judge, and assuming that he has made a reasonable determination that a warrant is not required under the circumstances, the officer's reasonable but mistaken assessment of probable cause will not trigger the exclusionary rule. The impact on the officer's decision whether to obtain a warrant is apparent: a reasonable but mistaken determination of probable cause by the officer will not support the issuance of a warrant, while if the officer bypasses prior judicial review and proceeds without a warrant, the same erroneous determination of probable cause may not necessarily result in the suppression of evidence obtained.

B. General Concerns About the Good Faith Exception.

Having reviewed three specific applications of the good faith exception, we turn now to general concerns about the proposed good faith modification of the exclusionary rule.

1. Adoption of a Good Faith Exception May Halt The Development of Fourth Amendment Law.

As Justice Powell recently noted, one of the primary benefits of the exclusionary rule is to "encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate fourth amendment ideals into their value system." Stone v. Powell, 428 U.S. 465, 492-93 (1976). It has been argued that if the exclusionary rule is restricted by the good faith exception, the development of fourth amendment law will come to a halt, and along with it police concern about protecting constitutional rights. "The courts would lose their principal incentive to continue to develop fourth amendment law because the substantive law would have become non-determinative of the result reached in suppression motions in criminal cases." Committee Report on the Exclusionary Rule, Committee on Criminal Law N.Y. Bar Record, 598 (1982). This is so because under a good faith exception the key issue to be decided by a court on ruling whether to suppress evidence is not whether the challenged conduct violated the fourth amendment but rather whether the peace officer or magistrate acted reasonably in believing that his conduct was proper. The underlying constitutional issue need never be decided.

The relationship between the good faith exception and its effect on the development of fourth amendment law, has been summarized as follows:

> A criminal statute or prior judicial decision of a procedural character, however, carries no penalty of its own. As a result, a victim of police action undertaken pursuant to such a statute or decision has neither the incentive nor the opportunity to challenge its constitutionality except through a motion to suppress the evidence obtained. A good faith exception that excuses unconstitutional conduct taken in reliance on such statutes and decisions removes that incentive and opportunity, and thereby ensures that police misconduct will occur and recur free from judicial correction.
>
> Similarly, when evidence is uncovered in the course of an arrest or search made pursuant to a warrant, the validity of the warrant itself can be challenged only through a motion to suppress. Yet it seems clear that a search or arrest made in reliance on

> an invalid warrant also will be excused under the technical violations facet of the good faith exception....
>
> Although the Williams court insisted that the good faith exception limits only the exclusionary rule and not the fourth amendment, it was plainly wrong. By defining "technical violations" to include good faith reliance on court decisions, statutes of a procedural nature, and warrants, the court insulated many fourth amendment violations from the deterrent effect of the exclusionary rule. The court justified this result on the ground that the exclusionary rule can have no deterrent effect when a police officer relies in good faith on a statute or prior court decision. This, too, is plainly wrong. By identifying the fourth amendment infirmities in the statute or decision on which the officer has relied, future fourth amendment violations will be prevented. The good faith exception ensures that this process of identification will be delayed or will not occur at all.

Mertens, supra, at 426-27 (footnotes omitted).

2. The Good Faith Exception May Encourage Ignorance of The Law.

One frequent criticism of the good faith exception is that it would substantially reduce the incentive for police departments to establish or continue training programs on criminal procedure and constitutional law. It is feared that these programs will allow the defendant to argue that the officer was familiar with the law and therefore could not have reasonably believed his conduct to be proper. The good faith exception therefore "would put a premium on the ignorance of the police officer and more significantly on the department that trains him." Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1030 (1974)

One innovative approach in responding to the potential that a good faith exception will foster institutional ignorance of the fourth amendment appears in sec. 12.45.015(b) of SB 49. That provision requires completion of a training program in constitutional and criminal procedure law as a

prerequisite to a judicial finding of good faith on the part of the officer. By requiring the continued development and availability of these programs, SB 49 minimizes the criticism that the good faith exception encourages institutional ignorance of the law.

3. The Good Faith Exception May Further Burden the Resources of the Judicial System.

Another general concern about the good faith exception is that it will do little to reduce the time that judges, prosecutors, and defense attorneys must devote to pretrial suppression motions. It has been argued instead that those motions and hearings would become even more time consuming under the good faith exception.

> [The good faith exception] leaves unresolved whether the defendant will be allowed to call as witnesses the police brass in charge of training and continuing education of line officers. If he is permitted to call these witnesses, then present suppression hearings, which opponents of the exclusionary rule criticize for consuming precious court time, will seem positively fleeting by comparison to those born of the good faith exception. If the defendant is precluded from calling these witnesses, however, how can he make the necessary "expedition in the mind of the public officers" to prove bad faith or unreasonableness.

Mertens, supra, at 448-49.

Testifying before the House of Representatives, Judiciary Subcommittee on Criminal Justice on Dec. 2, 1982, Alan Ellis, representing the Philadelphia Bar Association, discussed the possible effect of a good faith exception on an already overburdened criminal justice system.

> At a time when we are trying to reduce court costs and delays, introduction of a new ... test will trigger years of litigation, as courts are forced to throw out well developed case law." Any change would just be an "unabated waste of criminal resources," he maintained. Already overworked judges and defense attorneys would have to delve into the subjective intent of police officers and perhaps even consider a department's entire

> training program. Lengthy litigation would revolve around the sole issue of "good faith." Additional public defenders and judges would be needed. Also, it would be impossible to develop a consistent, workable body of law because decisions would be made on a case-by-case basis.
>
> 32 Crim. L. Rep. 2199

While a prediction of "havoc" in the courts is easy to make whenever an important change in the criminal justice system is proposed, it is apparent that adoption of a good faith exception will have some effect on the time associated with judicial determinations of motions to suppress. Aside from the obvious constitutional litigation that will arise from adoption of a good faith exception to the exclusionary rule, the overall effect of the change on the criminal justice system can only be viewed as speculative at this time.

V. THE "SUBSTANTIALITY" TEST.

In 1975 the American Law Institute (ALI) proposed a modification of the exclusionary rule to provide that only "substantial" violations of the fourth amendment should require suppression of the evidence. ALI Model Code of Prearrangement Procedure § 290.2 (1975) (The ALI proposal is included as Appendix F.) The key policy underlying the substantiality test is that the exclusionary rule should be limited to those areas where its application is most rational and compelling. The Code does not define when a violation is substantial but rather lists the following six factors that can be considered by a court in deciding whether evidence should be suppressed:

(1) the extent of deviation from lawful conduct;

(2) the extent to which the violation was willful;

(3) the extent to which privacy was invaded;

(4) the extent to which exclusion will tend to prevent violations of this Code;

(5) whether, but for the violation, the things seized would have been discovered;

(6) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

In 1982, Utah adopted a limited version of the ALI test which provided that evidence seized pursuant to a search warrant should not be suppressed unless the violation was "substantial." Utah Code Ann. § 77-23-12 (1982). (The statute appears as Appendix G). The Utah statute does not include general guidelines to be used in determining whether a particular violation was substantial, but provides that if the warrant was obtained with a malicious purpose or executed wilfully beyond the authority of the warrant or with excessive force a per se substantial violation has occurred.

An attempt to adopt a substantiality test applying to all violations of the fourth amendment was introduced as SB 713 during the 1982 Alaska legislature by Senator Dankworth. Though SB 713 died in committee, the bill included the circumstance of whether the peace officer acted "in the good faith and reasonable belief that his conduct was authorized" as one of the factors a court could consider in determining whether a violation was in fact substantial. SB 713 is included as Appendix H.

One criticism of the ALI test is that it would be impossible to administer. This criticism is answered by one commentator who, however, goes on to cite other difficulties with the ALI "substantiality" test.

> [T]he purpose of the test is to invite courts to reconsider the need for exclusion where the fourth amendment violation is relatively minor and is neither wilful nor reflective of agency policy or general indifference to individuals' rights. The ALI formulation thus sets forth factors that the courts might consider in developing a body of factual precedent concerning what constitutes a substantial violation. It does not require that the courts consider and weigh every possible factor in every case. For example, focusing on the willfulness of a violation might lead a court to determine that a police officer's good faith mistake in procuring evidence does not amount to a substantial violation. Similarly, the fact that the evidence would inevitably have been discovered legally might lead courts to refrain from applying the exclusionary rule. Finally, privacy considerations might lead courts to reject exclusion when the police conduct a search with probable cause but without first obtaining a warrant.
>
> Judicial focus on the factors set forth in the substantiality test might rapidly generate a large body of law. The major difficulty with the ALI factors, however, is that this new body of law would have many of the same drawbacks that would result from limitations based on good faith and the seriousness of the offense. In effect, fourth amendment violations would be condoned in a certain percentage of cases. As a result, the deterrent effect of exclusion would be dissipated because "officers would no longer find it pointless to seize evidence when prosecution was the goal, for the evidence might very well be ruled admissible.

Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule 69 Geo. L. J. 1365, 1423 (1981) (footnotes omitted)

As a practical matter, many of the same factors that a court will use in applying the substantiality test will be also used in determining whether a good faith violation of the fourth amendment has occurred. Conduct amounting to a gross deviation from the requirements of the fourth amendment or a willful violation are unlikely to satisfy either the substantiality or good faith exceptions. On the other hand, by particularly emphasizing the importance of deterring police misconduct and the need to protect privacy in

making a determination whether evidence should be suppressed, the ALI substantiality test may stand a better chance of being upheld by the Alaska Supreme Court than the good faith test.

VI. MISCELLANEOUS ALTERNATIVES TO THE EXCLUSIONARY RULE.

In addition to modifying the exclusionary rule by the good faith and substantiality tests, several other alternatives to the rule have been proposed including criminal prosecutions, civil lawsuits, injunctions and administrative discipline. Without exception, these alternatives have only supplemented and not replaced the exclusionary rule. A brief summary of two of these alternatives, criminal prosecution and civil lawsuits, follows below.

A. Criminal Prosecution

In theory, the victim of an illegal search or seizure may seek criminal prosecution of the officials who participated in the improper conduct. While prosecution for criminal trespass or assault is possible in cases where the officer was acting maliciously, the most appropriate statute in Alaska covering violations of the fourth amendment is AS 11.76.110, Interference with Constitutional Rights. That crime, punishable by a maximum fine of $5,000 and/or a maximum one year jail sentence, provides as follows:

> Sec. 11.76.110. INTERFERENCE WITH CONSTITUTIONAL RIGHTS. (a) A person commits the crime of interference with constitutional rights if
>
> (1) he injures, oppresses, threatens, or intimidates another person with intent to deprive that person of a right, privilege, or immunity in fact granted by the constitution or laws of this state;
>
> (2) he intentionally injures, oppresses, threatens, or intimidates another person because that person has exercised or enjoyed a right, privilege, or immunity in fact granted by the constitution or laws of this state; or

> (3) under color of law, ordinance, or regulation of this state or a municipality or other political subdivision of this state, he intentionally deprives another of a right, privilege, or immunity in fact granted by the constitution or laws of this state.

The Alaska statute is patterned after the similar federal statute, 18 U.S.C.A § 242. There have been no prosecutions under the Alaska statute since its enactment. The companion federal provision is also rarely used in fourth amendment cases.

> [T]he narrow construction of the statute together with the reticence of prosecutors to bring actions against the police have rendered § 242 an impotent deterrent to police misconduct. Although there have been a handful of cases brought under this provision and some convictions, this sanction has normally been applied only to the most outrageous kinds of police misconduct, usually involving brutality. Because of this application of criminal sanctions to police misconduct only when the policeman clearly is acting lawlessly, it is unrealistic to anticipate that this federal criminal provision will ever operate to control the conduct of police, especially in relatively nonviolent Fourth Amendment cases.

Whitebread, Criminal Procedure § 2.05, 50 (1980)

In addition to the specific proof problems inherent in establishing the elements of any crime beyond a reasonable doubt, there are two additional difficulties in proceeding criminally against an officer who violates the fourth amendment. Prosecuting attorneys are unlikely to be enthusiastic about bringing charges against police officers unless the conduct was particularly outrageous. Additionally, the good faith of the officer is likely to be a defense to negate the level of culpability required for conviction. This is particularly true in a statute such as AS 11.76.110 where a specific intent to interfere with constitutional rights must be established beyond a reasonable doubt. Consequently, while criminal prosecution of an officer may

be appropriate in cases of extremely aggravated violations of the fourth amendment, it is highly unlikely that criminal prosecution can provide an effective alternative to the exclusionary rule in the vast majority of cases where the rule is currently applied.

B. Civil Lawsuits

A victim of an unlawful search or seizure faces a wide range of legal and practical difficulties should he or she decide to pursue a civil action against the offending officer. First, the plaintiff must be willing to pay the significant costs of litigation. Second, ordinarily an officer's good faith and reasonable belief that his actions were legal will constitute a complete defense to an action against the officer. See generally, 1 LaFave, Search and Seizure § 1.5(a) 1978). Finally, even if the victim can establish a violation of his rights, actual damages will ordinarily be nominal because an illegal search and seizure does not directly injure a person or his property.

In his dissenting opinion in Bivens v. Six Unknown Named Agents, Chief Justice Burger proposed that Congress develop the following remedy against the government to compensate persons whose fourth amendment rights have been violated:

(a) waiving sovereign immunity for causes of action arising out of the illegal acts of law enforcement personnel committed in the line of duty;

(b) establishing a cause of action for damages for any person injured by a government agent's conduct violating the fourth amendment or violating any other statute enacted to regulate official conduct;

(c) forming a tribunal of lawyers, who would not be swayed by sympathy for officers or by prejudice against criminals, to adjudicate all claims under the proposed statute;

(d) providing that this remedy replace the fourth amendment exclusionary rule; and

(e) prohibiting the exclusion of evidence in any criminal proceeding because of fourth amendment violations.

403 U.S. 388, 422-423 (1971), (Burger, C.J., dissenting).

The practical difficulties of the Chief Justice's proposal were discussed by Professor Amsterdam:

> Where are the lawyers going to come from to handle these cases for the plaintiffs? Gideon v. Wainwright and its progeny conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search-and-seizure case? The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge priors or to pile on 'cover' charges? The opportunity to represent his client without fee in these resulting criminal matters?

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 430 (1974).

CONCLUSION

To the extent that the legislature concludes that the exclusionary rule should be modified, it would appear appropriate to adopt a version of the good faith exception to the exclusionary rule limited to those applications that are most likely to be held constitutional by the Alaska Supreme Court. Proposed draft legislation adopting a good faith exception applicable to

searches pursuant to warrants reasonably believed to be valid and searches incident to arrests for crimes that are subsequently declared unconstitutional follows as Appendix I. An accompanying commentary and sectional analysis for the draft legislation appears as Appendix II.

APPENDIX I

PROPOSED LEGISLATION LIMITING THE APPLICATION OF THE EXCLUSIONARY RULE

For an Act entitled: "An Act relating to the exclusionary rule; and changing Rule 412, Alaska Rules of Evidence."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.015. LIMITATION ON APPLICATION OF THE EXCLUSIONARY RULE. (a) Illegally obtained evidence may not be excluded in a criminal prosecution if the prosecution establishes by a preponderance of the evidence that the evidence was obtained

(1) pursuant to and within the scope of a search warrant issued by a judge or magistrate who acted with the reasonable, good faith belief that probable cause for the warrant existed and the peace officer who executed the warrant acted with the reasonable, good faith belief that the warrant was valid;

(2) during a lawful search incident to an arrest pursuant to an arrest warrant, and the judge or magistrate who issued the warrant acted with the reasonable, good faith belief that probable cause for the warrant existed and the peace officer who executed the warrant acted with the reasonable, good faith belief that the warrant was valid; or

(3) during a lawful search incident to an arrest for a crime that is subsequently declared unconstitutional or invalid.

(b) For purposes of this section, a peace officer shall not be considered to have acted with a "reasonable, good faith belief" unless he has successfully completed training in constitutional law and criminal procedure as required by the Alaska Police Standards Council (AS 18.65.130).

* Sec. 2. Rule 412 of the Rules of Evidence is amended to read:

RULE 412. EVIDENCE ILLEGALLY OBTAINED. Except for evidence admitted under the provisions of AS 12.45.015, [EVIDENCE] illegally obtained evidence shall not be used over proper objection by a defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384 U.S. 436 (1966), may be used to a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) Other evidence illegally obtained may be permitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights.

APPENDIX II

PROPOSED LEGISLATION LIMITING APPLICATION OF THE EXCLUSIONARY RULE

COMMENTARY AND SECTIONAL ANALYSIS

This legislation adopts a limited good faith exception to the exclusionary rule in cases where evidence is seized pursuant to an invalid search or arrest warrant or incident to an arrest for a crime that is subsequently declared invalid or unconstitutional.

"Good-Faith" Exception to the Exclusionary Rule-Sec. 12.45.015(a)

Section 12.45.015(a) adopts three limited exceptions to the exclusionary rule allowing a reasonable good faith violation of the fourth amendment to prevent application of the rule. The burden of proof is placed on the prosecution to establish each exception by a preponderance of the evidence. General arguments in favor of a good faith exception to the exclusionary rule are found in § IV, supra.

Section 12.45.015(a)(1) provides that the exclusionary rule is not to be applied when evidence is seized pursuant to an improperly issued search warrant when (1) the evidence that is seized is within the scope of the warrant; (2) the judicial officer who issued the warrant acted with a reasonable good faith belief that probable cause existed for the search; and (3) the officer who executed the warrant acted with a reasonable good faith belief that the warrant was valid. All three circumstances must exist for the exception to apply. Not only must both the judicial officer and peace officer subjectively believe that they are acting properly, but that belief must be objectively reasonable under all

the circumstances. A detailed discussion of the scope, effect, and constitutionality of this exception to the application of the exclusionary rule appears in § IV, A,1, supra.

Section 12.45.015(a)(2) adopts a second limited good faith exception to the exclusionary rule that is similar in purpose and effect to the exception in sec. 12.45.015(a)(1). This provision, however, applies to a search incident to an arrest under an invalid arrest warrant while the exception in sec. 12.45.015(a)(1) applies to a search pursuant to invalid search warrant. If a peace officer obtains an arrest warrant and conducts a lawful search incident to the arrest, evidence seized pursuant to the search will not be suppressed if it later turns out that the arrest warrant was invalid, provided that both the judicial officer and peace officer acted reasonably and in good faith. The rationale of applying the good faith exception in cases involving the execution of a search warrant applies with equal force to cases involving the execution of an arrest warrant since in both instances the officer is acting reasonably and with prior judicial authorization for his conduct.

It should be noted that the good faith exception in sec. 12.45.015(a)(2) will only apply if the search incident to the arrest was otherwise lawful. Consequently, if the officer exceeds his authority in conducting an improper search (i.e., a search that is too extensive in scope under the circumstances) any evidence obtained will be suppressed even though the officer may have acted in the good faith belief that the scope of the search was proper. The reasonableness of the officer's belief is only relevant to the issue of whether he believed the underlying arrest warrant to be valid.

Section 12.45.015(a)(3) adopts a third good faith exception to the exclusionary rule applying to a search conducted incident to an arrest for a crime that is subsequently declared unconstitutional or invalid. This limited exception to the exclusionary rule is based on the decision of the United States Supreme Court in Michigan v. DeFillippo, 443 U.S. 31 (1979). The scope, effect, and constitutionality of this exception to the exclusionary rule is discussed in § IV, A,3, supra.

Section 12.45.015(b) is similar in approach to sec. 12.45.015(b) of SB 49. It requires that an officer receive adequate training in constitutional and criminal procedure law as a prerequisite to a judicial finding that he acted with a reasonable good faith belief for purposes of applying the good faith exception to the exclusionary rule. This requirement will reaffirm the legislature's continued commitment that peace officers in Alaska be fully trained in criminal and constitutional law.

It should be noted that this legislation does not include several applications of the good faith exception to the exclusionary rule that have recently been proposed. Specifically rejected is the circumstance where a search or arrest is conducted pursuant to a judicial decision or procedural statute that is subsequently declared unconstitutional or invalid as well as cases where an officer makes a good faith but mistaken determination of facts constituting probable cause. These applications of the good faith exception have been rejected for the reasons discussed in §§ IV, A,1 and IV, A,2, supra.

While limiting application of the exclusionary rule in the three limited circumstances examined, it is not the intent of this legislation to limit the enforcement of any appropriate civil remedy or criminal sanction that may be available under law for a violation of the fourth amendment.

Sec. 2, Amendment of Evidence Rule 412

This section amends Alaska Rule of Evidence 412 to make it consistent with the changes made to the exclusionary rule in this legislation.

APPENDIX A

ALASKA RULE OF EVIDENCE 412

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be permitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights.

APPENDIX B

PRESIDENT REAGAN'S PROPOSED GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

HR 7117; Section 202

§ 3505. APPLICATION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.

APPENDIX C

ARIZONA GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

ARIZ. REV. STAT. ANNOT. § 13-3925 (1982)

13-3925. Admissibility of evidence obtained as a result of unlawful search or seizure

A. IF A PARTY IN A CRIMINAL PROCEEDING SEEKS TO EXCLUDE EVIDENCE FROM THE TRIER OF FACT BECAUSE OF THE CONDUCT OF A PEACE OFFICER IN OBTAINING THE EVIDENCE, THE PROPONENT OF THE EVIDENCE MAY URGE THAT THE PEACE OFFICER'S CONDUCT WAS TAKEN IN A REASONABLE, GOOD FAITH BELIEF THAT THE CONDUCT WAS PROPER AND THAT THE EVIDENCE DISCOVERED SHOULD NOT BE KEPT FROM THE TRIER OF FACT IF OTHERWISE ADMISSIBLE.

B. THE TRIAL COURT SHALL NOT SUPPRESS EVIDENCE WHICH IS OTHERWISE ADMISSIBLE IN A CRIMINAL PROCEEDING IF THE COURT DETERMINES THAT THE EVIDENCE WAS SEIZED BY A PEACE OFFICER AS A RESULT OF A GOOD FAITH MISTAKE OR TECHNICAL VIOLATION.

C. IN THIS SECTION:

1. "GOOD FAITH MISTAKE" MEANS A REASONABLE JUDGMENTAL ERROR CONCERNING THE EXISTENCE OF FACTS WHICH IF TRUE WOULD BE SUFFICIENT TO CONSTITUTE PROBABLE CAUSE.

2. "TECHNICAL VIOLATION" MEANS A REASONABLE GOOD FAITH RELIANCE UPON:

(a) A STATUTE WHICH IS SUBSEQUENTLY RULED UNCONSTITUTIONAL

(b) A WARRANT WHICH IS LATER INVALIDATED DUE TO A GOOD FAITH MISTAKE.

(c) A CONTROLLING COURT PRECEDENT WHICH IS LATER OVERRULED, UNLESS THE COURT OVERRULING THE PRECEDENT ORDERS THE NEW PRECEDENT TO BE APPLIED RETROACTIVELY.

D. THIS SECTION SHALL NOT BE CONSTRUED TO LIMIT THE ENFORCEMENT OF ANY APPROPRIATE CIVIL REMEDY OR CRIMINAL SANCTION IN ACTIONS PURSUANT TO OTHER PROVISIONS OF LAW AGAINST ANY INDIVIDUAL OR GOVERNMENT ENTITY FOUND TO HAVE CONDUCTED AN UNREASONABLE SEARCH OR SEIZURE.

E. THIS SECTION DOES NOT APPLY TO UNLAWFUL ELECTRONIC EAVESDROPPING OR WIRETAPPING.

APPENDIX D

COLORADO GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE
COLO. REV. STAT. § 16-3-308 (1981)

Evidence - admissibility - declaration of purpose. (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer, as defined in section 18-1-901(3)(l), C.R.S. 1973, as a result of a good faith mistake or of a technical violation.

(2) As used in subsection (1) of this section:

(a) "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.

(b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

(3) Evidence which is otherwise admissible in a criminal proceeding and which is obtained as a result of a confession voluntarily made in a noncustodial setting shall not be suppressed by the trial court.

(4) It is hereby declared to be the public policy of the state of Colorado that when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, that it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise

admissible. This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

Introduced: 1/18/83
Referred: Judiciary

APPENDIX B

BY RAY, BENNETT, HALFORD AND PETTYJOHN

IN THE SENATE

SENATE BILL NO.49

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the exclusionary rule; changing Rule 37(c), Rules of Criminal Procedure, and Rule 412, Alaska Rules of Evidence, by limiting application of the exclusionary rule when a good faith search only results in technical violations of the constitutional guarantee against unlawful search and seizure."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.015. LIMITATION ON APPLICATION OF THE EXCLUSIONARY RULE. (a) If the defendant in a criminal action seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the judge may not grant the request if the prosecution satisfies the judge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact, if otherwise admissible, because the conduct resulted in only a technical violation of the defendant's right to be protected from unlawful searches and seizures.

(b) A peace officer is considered to act in good faith for purposes of (a) of this section if the peace officer has completed a law enforcement academy or other approved prerequisite curriculum and any mandatory subsequent training or instruction in constitutional law and criminal procedure required by the Alaska Police Standards Council

(AS 18.65.130) and obtains evidence

(1) based on a search warrant obtained from a neutral and detached magistrate or judge, which warrant is free from obvious defects other than unintentional errors in preparation and is reasonably believed by the peace officer to be valid;

(2) in a warrantless search, when the peace officer

(A) reasonably believes there is probable cause to make the search;

(B) possesses a reasonable suspicion that the person or premises searched possesses or contains items of an evidentiary nature; and

(C) reasonably believes there are circumstances that excuse the procurement of a search warrant;

(3) in a search incident to an arrest, when the peace officer

(A) reasonably believes that there is probable cause to make the arrest and that there are circumstances that excuse the procurement of an arrest warrant; or

(B) procures or executes an invalid arrest warrant that the peace officer reasonably believes to be valid; or

(4) based on a statute, local ordinance, judicial precedent or court rule that is later declared unconstitutional or otherwise invalid.

* Sec. 2. AS 12.45.015, added by sec. 1 of this Act, has the effect of amending Rule 37(c), Rules of Criminal Procedure, and Rule 412, Alaska Rules of Evidence, by limiting the application of the exclusionary rule when a good faith search only results in technical violations of the constitutional guarantee against unlawful search and seizure.

APPENDIX F

A.L.I. SUBSTANTIALITY TEST

(2) Determination A motion to suppress evidence pursuant to this section shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this State.

If the court finds a violation not to be substantial it shall set forth its reasons for such finding.

(3) Violations Deemed Substantial. A violation shall in all cases be deemed substantial if it was gross, wilful and prejudicial to the accused. A violation shall be deemed wilful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it.

(4) Circumstances to Be Considered in Determining Substantiality. In determining whether a violation not covered by Subsection (3) is substantial, the court shall consider all of the circumstances including:

(a) the extent of deviation from lawful conduct;

(b) the extent to which the violation was wilful;

(c) the extent to which privacy was invaded;

(d) the extent to which exclusion will tend to prevent violations of this Code;

(e) whether, but for the violation, the things seized would have been discovered; and

(f) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

APPENDIX G

UTAH SUBSTANTIALITY EXCEPTION TO THE EXCLUSIONARY RULE

UTAH CODE ANN. § 77-23-12 (1982)

EVIDENCE SEIZED PURSUANT TO WARRANT NOT EXCLUDED UNLESS UNLAWFUL SEARCH OR SEIZURE SUBSTANTIAL - "SUBSTANTIAL" DEFINED. Pursuant to the standards described in section 771-35-12(g) property or evidence seized pursuant to a search warrant shall not be suppressed at a motion, trial, or other proceeding unless the unlawful conduct of the peace officer is shown to be substantial. Any unlawful search or seizure shall be considered substantial and in bad faith if the warrant was obtained with malicious purpose and without probable cause or was executed maliciously and willfully beyond the authority of the warrant or with unnecessary severity.

Introduced: 2/4/82
Referred: Judiciary

APPENDIX H

IN THE SENATE BY DANKWORTH

SENATE BILL NO. 713

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to violations of individual constitutional rights by government; and amending Rule 412 of the Rules of Evidence."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 12.35 is amended by adding a new section to read:

Sec. 12.35.130. LIMITATION OF EXCLUSIONARY RULE. (a) Illegally obtained evidence may not be excluded from a criminal proceeding unless the court finds, as a matter of law, that the violation was substantial.

(b) In determining whether a violation is substantial for the purposes of (a) of this section, the court shall consider all of the circumstances including

(1) the extent to which exclusion will tend to prevent future deviations from lawful conduct;

(2) the extent to which privacy was invaded;

(3) the extent of deviation from lawful conduct; and

(4) whether the peace officer acted in good faith and in the reasonable belief that his actions were legally authorized.

* Sec. 2. AS 09.50.250 is amended by adding a new subsection to read:

(b) Nothing in (a) of this section prevents an individual from bringing an action based on a violation of art. I, sec. 14, or art. I, sec. 22 of the Constitution of the State of Alaska.

* Sec. 3. Rule 412 of the Rules of Evidence is amended to read:

RULE 412. EVIDENCE ILLEGALLY OBTAINED. Except for evidence admitted under the provisions of AS 12.35.130, [EVIDENCE] illegally

SB 713

obtained evidence shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights.

SB 49

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5. Mertens & Wesserstrom, Georgetown Law Journal Article (pp. 365-463).

6. Colo. Revised Statutes, Sec. 16-3-308.

7. Wilkey, Judicature Article (pp. 215-232).

8. Canon, Judicature Article (pp 398-403).

9. Impact (AELE) Article (pp. 1-3).

10. Amici Curiae brief in Illinois v. Gates.

11. Memo re other materials requested to date.

(c) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

EVIDENCE RULES

Rule 412. Evidence Illegally Obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under *Miranda v. Arizona,* 384 U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights. (Added by Supreme Court Order 364 effective August 1, 1979)

Definition of "Exclusionary Rule:

Evidence obtained in violation of the Fourth Amendment is inadmissible in a criminal prosecution.

"Fourth Amendment" refers to the federal constitution, as well as article 1, section 14 of the Alaska Constitution.

Evidence can also be exluded for violations of other federal and state constitutional rights:

1. 5th am. privilege vs. self incrimination; e.g.s., Mirande & forced confessions.

2. 6th am. right to counsel.

3. Due process - right to not be convicted on unreliable identification.

4. Rights created by federal statutes.

5. Rights created by state constitution and statutes which go beyond federal constitutional protections.

ISSUE: Is 2/3 majority vote of legislature required to enact legislation limiting or amending the "exclusionary rule"?

Rule of Evidence - 412 is the actual "exclusionary rule".

Rule of Criminal Procedure - 37 (c) (copy attached) sets forth the procedure whereby the exclusionary rule can be invoked by motion to suppress.

Alaska Constitution, Article IV, Section 15, provides that court rules may only be changed by the legislature by a 2/3 vote.

TEST: Is proposed limitation or amendment substantive or procedural?

HOUSE JUDICIARY SUBCOMMITTEE WEIGHS PROPOSED CHANGES TO EXCLUSIONARY RULE

Witnesses give Reagan Adminstration's "good-faith" exception little encouragement.
▸350.03 ▸100.05

In early September Congress received President Reagan's draft of proposed changes in the field of criminal law. The proposals, embodied in S 2903 and HR 7117, are entitled the "Criminal Justice Reform Act of 1982" and, among other things, call for a change in the exclusionary rule. The Adminstration would like to amend chapter 223 of title 18 USC to establish a "good-faith exception" to the rule, allowing for the admission of evidence resulting from a search or seizure "undertaken in a reasonable, good faith belief that it was in comformity with the fourth amendment." 31 CrL 2540.

Additionally, just last week the Supreme Court called for reargument in Illinois v. Gates (No. 81-430, argued 10/13/82, 32 CrL 4069) and requested the parties to address the question of "whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, * * * should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." 32 CrL 4105.

Against this backdrop, on December 2 the House of Representantives' Judiciary Subcommittee on Criminal Justice continued its oversight hearings on the operation of the exlusionary rule. Subcommittee Chairman John Conyers, Jr. (D-Mich) characterized the issue before the subcommittee as whether or not forces were now moving against the Fourth Amendment itself. The first witness called was Silas Wasserstrom, Associate Professor of Law, Georgetown University Law Center, and former Chief of the Appellate Division of the Public Defender Service for the District of Columbia. He referred extensively to a recent article "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Dergiling the Law," 70 Geo L.J. 365 (1981), of which he was co-author.

FOURTH AMENDMENT STIFLED

Wasserstrom first addressed the potential outcome of the Gates v. Illinois reargument. He told the subcommittee that if the Supreme Court decides to adopt a good-faith exception to the exclusionary rule it would render any proposed legislation superfluous and any constitutional challenges moot. He predicted that it would not be unlikely for a limited version of this exception to be adopted in Gates. However, Wasserstrom continued, even this would be a "substantial inroad" on the exclusionary rule.

In an attempt to deter police misconduct, the Court may limit the exception to cases wherein police are acting pursuant to a warrant, Wasserstrom opined. But he quickly noted that then the question of judicial misconduct in issuing the warrant would arise. The result of any inquiry would be "odd" because the language of the Fourth Amendment makes clear that warrants shouldn't issue except on probable cause. Thus, if the Court decides to allow searches pursuant to illegal warrants, it would be offending the Amendment's very purpose, Wasserstrom declared.

He cautioned that if Congress' attempts to promulgate its own exception to the rule, aimed at upholding the admission of any evidence seized in reasonable good faith, it might not only go beyond the future "Gates rule" but could make any search conducted pursuant to warrants "per se good faith."

Wasserstrom strongly objected to Conyers' observation that the issue really is "real world" law enforcement versus "whether an arcane constitutional provision is minutely enforced." The Fourth Amendment protects us from a police state, Wasserstrom declared, noting that criticism directed at the exclusionary rule may really be aimed at the Fourth Amendment itself. This prompted him to suggested that the subcommittee might want to consider repealing the Fourth Amendment. The exclusionary rule does not hamstring police, the Amendment does.

To what extent are police inhibited by the Fourth Amendment? Conyers asked. Only in the sense that the Amendment tells them what they can and cannot do, Wasserstrom replied. A civil remedy directed at an individual police officer would be a far more drastic deterrent to police misconduct than the exclusionary rule, he added. However, a tort remedy would be an inadequate substitute for the rule, Wasserstrom stressed. The reason for this brought him to the gist of his argument against adopting the good-faith exception --- the exclusionary rule's importance in the development of Fourth Amendment law.

If the exclusionary rule is eliminated or even if the exception is adopted, Fourth Amendment doctrine will petrify, Wasserstrom explained. Courts will never reach the question of whether an officer violates the Fourth Amendment because they will stop at the good-faith issue. Once this is determined the case is over.

At this point subcommittee member Bill McCollum (R-Fla) interrupted. You have made an underlying assumption that good faith will always be found; this concludes that justice will always fall on the side of the police, McCollum pointed out.

If the good-faith exception is adopted, Wasserstrom answered, the law freezes. The defendant will be asking for a change in existing law while the prosecution will be claiming a good-faith reliance on that law; courts won't give into change. Therefore defendants will have no incentive to pursue novel Fourth Amendment claims and courts will, in effect, be choking off the development of Fourth Amendment law. The courts will actually be amending Fourth Amendment law because they will no longer be required to look for probable cause, Wasserstrom maintained.

At this juncture Wasserstrom turned his attention to the Fifth Circuit's holding in U.S. v. Williams, 622 F2d 830, 27 CrL 3293 (en banc 1980), that "reason [as well as authority] plainly demand[d] explicit recognition of a good faith exception" to the exclusionary rule. He took this decision to task, arguing that reasonableness and good faith are already built into existing Fourth Amendment law. In reality the exception changes and stifles existing law, he contended. The exclusionary rule should be supplemented, not changed or excepted to, Wasserstrom concluded; that is the only way it will grow.

BLAME POLICE ADMINISTRATORS

The next witness before the subcommittee was Sue Marie Johnson, Deputy Director of the Police Executive Research Forum, an organization of police executives from the nation's larger jurisdictions. She opened her testimony by stressing the organization's belief that the exclusionary rule, by itself, is not a sufficient deterrent on unconstitutional police actions. Like Wasserstrom Johnson rejected the good-faith exception to the rule, but she then proposed an an alternative — place the responsibility for police misconduct on police administrators and not on individual officers. This not only serves the rule's purpose, it also broadly influences the improvement of policing, she explained. The change in focus of the judicial sanction, from individual officers to their departments, will provide police agencies with the incentive to develop programs for effective deterrence of police misconduct. Additionally, police officers will be more willing to perform their duties in a constitutional fashion if they know that the regulations are internal.

This is a "risk free" proposal, Johnson claimed. It is limited only by the potential of police adminstrators to protect individuals' constitutional rights; if they fail then the exclusionary rule can be used. However, she added, the rule would not be applied if it is apparent that the police department in question had taken its responsibility to adhere to the Fourth Amendment seriously. Departments could show proof of such good faith by meeting three requirements: "1) publishing departmental rules and regulations that guide police on proper constitutional procedures; 2) instituting effective programs to train officers according to these rules and regulations; and 3) maintaining a history of disciplinary actions taken against officers, it having been demonstrated that the officers had committed violations of departmental rules."

The judge would then rule on whether or not the officer had committed a constitutional violation, Johnson continued. If the answer is yes then the prosecutor would ask the judge to review the three foregoing requirements. The prosecution would have the burden of proving that the requirements were met in a manner sufficient to ensure one of the following: that the failure to provide a rule was reasonable and that proper regulations would be forthcoming; or if the department already had a rule covering the circumstance involved, the officer would be disciplined for violating the rule unless he was acting reasonably and in good faith; or if the rule was found unconstitutional, it was promulgated in good faith, appeared reasonable at the time, and would be reissued in

proper form. Only if the prosecution's proof failed would the evidence would be excluded, Johnson said.

Johnson admitted that this proposal would lead to eventual replacement or ossification of the exclusionary rule. However, she noted, it also does away with all the problems the rule has engendered. She closed by stating that if the proposal was implemented on the federal level then states would soon follow suit, thus developing uniform guidelines and requirements.

NO CHANGE NEEDED

The final witness was the only member of the private criminal bar to address the Subcommittee thus far in its hearings. Alan Ellis, representing the Philadelphia Bar Association, appeared to voice that body's disagreement to any substantive change in the exclusionary rule. He contended that proposed legislation — HR 4259 (replacing the rule with a tort remedy), HR 4606, HR 5971, HR 6049, HR 4422 (all creating good faith exceptions) and S 101 (weighing intentional constitutional violations) — are not only of questionable constitutionality but also "would wreak havoc on the administration of criminal justice."

Focusing in particular on the proposed good-faith exception, Ellis said that "at a time when we are trying to reduce court costs and delays, introduction of a new * * * test will trigger years of litigation, as courts are forced to throw out well developed case law." Any change would also effect police department training programs and could eventually undercut the present extensive, high quality programs in constitutional rights that did not exist prior to Mapp v. Ohio, 367 U.S. 634 (1961), he added.

There is no need to change the rule, Ellis urged. Studies show that the rule actually has only an extremely minimal impact on criminal prosecutions, with eventual admission of most challenged evidence. Any change would just be an "unabated waste of criminal resources," he maintained. Already overworked judges and defense attorneys would have to delve in the subjective intent of police officers and perhaps even consider a department's entire training program. Lengthy litigation would revolve around the sole issue of "good faith." Additional public defenders and judges would be needed. Also, it would impossible to develop a consistent, workable body of law because decisions would be made on a case-by-case basis.

In additional to this list of hazards, Ellis stressed the symbolic weakening or abandonment of the exclusionary rule. Police would conclude that the Fourth Amendment was not a serious matter. The present law already considers an officer's objectively reasonable factual mistakes, Ellis noted. Thus instead of adding to the law any change may just weaken it.

Ellis also argued that when the Supreme Court held in Mapp v. Ohio that the exclusionary rule was an essential part of the Fourth and Fourteenth Amendments, it constitutionally proscribed the Congress from revoking or rescinding the rule. Accordingly, Ellis emphasized, the subcommittee's ability to act is limited. Only the Supreme Court has the authority to reduce or remove the application of the exclusionary rule, he declared.

The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law

WILLIAM J. MERTENS*
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For many years, courts and commentators have criticized the fourth amendment exclusionary rule as being both a device for "freeing the guilty," and an ineffective deterrent of illegal police conduct. Recently, this criticism has assumed a more tangible form; in United States v. Williams, *an en banc majority of the Fifth Circuit endorsed a "good faith" exception to the rule. In this article, Professor Wasserstrom and Mr. Mertens examine the exclusionary rule as a deterrent, and suggest that through a variety of methods the rule sufficiently discourages police misconduct to justify its retention. In addition, they use the* Williams *decision to illustrate the theoretical limitations of the good faith exception, and to demonstrate the problems it will cause in practice. They conclude that the exception will both dilute substantive fourth amendment standards and impede the development of fourth amendment law. Finally, the authors suggest that the current attack on the exclusionary rule may actually mask its critics' dissatisfaction with the requirements of the fourth amendment itself.*

I. INTRODUCTION

In 1914, the Supreme Court unanimously held in *Weeks v. United States*[1] that evidence seized in violation of the fourth amendment[2] is inadmissible in federal criminal prosecutions.[3] From its inception, this doctrine, which came to be known as the exclusionary rule,[4] was bitterly attacked by many commen-

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The views expressed in this article are solely those of the authors, and do not necessarily reflect those of the Public Defender Service for the District of Columbia.

1. 232 U.S. 383 (1914).

2. The fourth amendment 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.

3. 232 U.S. at 388.

4. Justice Frankfurter was the first member of the Supreme Court to use the term "exclusionary rule." United States v. Johnson, 319 U.S. 503, 520 (1943). Justice Black, however, was responsible for popularizing it as a term to describe the doctrine that evidence obtained in violation of the fourth amendment is inadmissable in a criminal prosecution. *See, e.g.*, United States v. Rabinowitz, 339 U.S.

tators.[5] Within the Supreme Court, however, the exclusionary rule stirred little controversy,[6] until thirty-five years later when the Court decided *Wolf v. Colorado*.[7]

56, 66-70, 71 (1950) (Black, J., dissenting), *overruled*, Chimel v. California, 395 U.S. 752 (1967); Wolf v. Colorado, 338 U.S. 25, 39 (1949) (Black, J., concurring), *overruled*, Mapp v. Ohio, 367 U.S. 655 (1961); United States v. Wallace & Tiernan Co., 336 U.S. 793, 798 (1949) (Black, J., writing for the Court). The term is now used to describe the exclusion of evidence on a variety of grounds. *See* note 52 *infra*.

5. Wigmore's attack was typical. 4 J. WIGMORE, WIGMORE ON EVIDENCE § 2184 (2d ed. 1923). Wigmore characterized the method of suppressing evidence as follows:

> "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else."
>
> Some day, no doubt, we shall emerge from this quaint method of enforcing the law . . . . It will be abandoned only as the judiciary rises into a more appropriate conception of its powers and a less mechanical idea of justice.

Id.

The most celebrated criticism of *Weeks*, however, remains that of Justice (then Judge) Cardozo in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). A single phrase in that case encapsulates the basic point made by virtually all of the rule's detractors: under the exclusionary rule, "[t]he criminal is to go free because the constable has blundered." *Id.* at 21, 150 N.E. at 587.

But this way of putting it is misleading, for it implies that if the constable had been more careful, the criminal would not go free. This may be so where the constable's only "blunder" was his failure to comply with the warrant requirement where one could have been obtained. When there is no probable cause for an arrest, however, it is not the constable's blunder that results in a criminal's going free. If the constable had abided by the constitutional standard, the criminal would still "go free," because he would remain unapprehended. It may be that it is only by virtue of the constable's blundering—violating the constitutional standard—that the criminal will be prosecuted at all.

6. Although the exclusionary rule itself did not stir great debate within the Supreme Court, the nature and scope of the privacy rights protected by the fourth amendment did. In *Olmstead v. United States*, Justices Holmes and Brandeis, in separate dissenting opinions, discussed whether the seizure of evidence through a wiretap that involved no physical trespass violated fourth and fifth amendment privacy rights. 277 U.S. 438, 469 (1928) (Holmes, J., dissenting), *overruled*, Katz v. United States, 389 U.S. 347 (1967); *id.* at 471 (Brandeis, J., dissenting).

Professor Posner has described the debate in *Olmstead* as involving whether the fourth amendment protects only the interest "in being left alone"—a right to seclusion—or also an interest in "concealing information—a right to secrecy." R. POSNER, THE ECONOMICS OF JUSTICE 272-73 (1981). Ironically, Professor Posner borrowed the phrase "the right to be left alone" from Justice Brandeis' *Olmstead* dissent, 277 U.S. at 478, and used it to describe the right to be free from physical intrusions, or, as he put it, "barging ins." R. POSNER, *supra*, at 311-12. Justice Brandeis, however, used the phrase much more broadly to extend fourth amendment protection to wiretaps, which involve no physical intrusion. He wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

277 U.S. at 478 (Brandeis, J., dissenting) (emphasis added). Somehow, this conveys a more enobling conception of man than the interest in "concealing information" and in being free from "barging ins" would seem to suggest.

7. 338 U.S. 25 (1949), *overruled*, Mapp v. Ohio, 367 U.S. 643 (1961). Although the exclusionary rule did not divide the Court until *Wolf*, even before *Weeks* the Court had vacillated about whether the fourth amendment itself applied to the states. *Compare* Adams v. New York, 192 U.S. 585, 594, 599

In *Wolf*, a sharply divided Court held that the fourth amendment right to be secure from unreasonable searches and seizures applied to the states through the due process clause of the fourteenth amendment;[8] nevertheless, the Court refused to require the states to enforce the right through the exclusionary rule.[9] Twelve years later, in *Mapp v. Ohio*,[10] the Court overruled *Wolf* and extended the exclusionary rule to the states.[11] After *Mapp*, the debate over the rule intensified. Still, as recently as 1965, one leading commentator saw "no basis for assuming that the Court will make any inroads on the *Mapp* holding in the years ahead."[12]

It has not turned out quite that way. In the years following that sanguine prognosis, the Burger Court had so eviscerated the exclusionary rule that by 1974, Justice Brennan, its staunchest supporter on the Court, feared that "a majority of [his] colleagues [had] positioned themselves to abandon altogether the exclusionary rule in search and seizure cases,"[13] not only in its application to state courts, but in the federal courts as well. So far, at least, it has not turned out quite that way either.

Instead, a majority of the Court seems to have accepted Chief Justice Burger's invitation to "reexamine the scope of the exclusionary rule and consider

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(1904) (suggesting, without deciding, that fourth amendment governed state officials) *with* Twining v. New Jersey, 211 U.S. 78, 92 (1908) (holding that first eight amendments to Constitution applied only to federal government).

8. 338 U.S. at 28. The first section of the fourteenth amendment reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

9. 338 U.S at 33. *Wolf* spawned five separate opinions in the Supreme Court, with Justice Frankfurter writing for the majority. Justice Black concurred in both the decision and the reasoning of the Court. *Id.* at 39 (Black, J., concurring). He wrote that although the fourth amendment applied to the states, the "exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence," *id.* at 39-40, and as such was not applicable to the states.

Justice Douglas dissented. *Id.* at 40 (Douglas J., dissenting). He argued that the fourth amendment applied to the states, and that "evidence obtained in violation of it *must* be excluded in state prosecutions as well as in federal prosecutions," *id.* (emphasis in original), if the fourth amendment was to have an effective sanction. *Id.*

Justice Murphy, joined by Justice Rutledge, also dissented. *Id.* at 41 (Murphy, J., with Rutledge, J., dissenting). He agreed that the fourth amendment applied to the states, *id.*, but contended that: "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence." *Id.* at 44. Justice Rutledge also wrote a separate dissent calling for application of the exclusionary rule to the states. *Id.* at 47-48 (Rutledge, J., dissenting).

10. 367 U.S. 643 (1961).

11. *Id.* at 655. Although a five-justice majority overruled *Wolf*, only four of the five based their decision solely on fourth amendment grounds. Justice Black, concurring, felt that the fourth amendment alone was not enough to require applying the exclusionary rule to the states, *id.* at 661-62 (Black, J., concurring), but that "when the Fourth Amendment's bar against unreasonable searches and seizures is considered together with the Fifth Amendment's bar against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Id.* at 662.

12. LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 392 (1965). Professor LaFave of the University of Illinois Law School has been referred to as "our leading search-and-seizure scholar." Kamisar, *Fourth Amendment Hatchback*, Wash. Post, Oct. 15, 1981, § A, at 29, col. 3. He has written extensively on the fourth amendment, and his remarkable three volume treatise, *Search and Seizure* (1978), clearly establishes his pre-eminence in the field.

13. United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., with Douglas & Marshall, JJ. dissenting).

at least some narrowing of its thrust."[14] The Burger Court has chipped away at the rule's edges, and has consistently confined its application, even in situations where the rule's purpose would clearly seem to require its extension.[15] Nevertheless, the Court has, thus far at least, preserved the rule in its paradigmatic application as a bar to the government's direct use in a federal prosecution of evidence seized unconstitutionally from a defendant.[16]

Thus, although it may not have been a great surprise, it was still newsworthy[17] when in *United States v. Williams*[18] the United States Court of Appeals for the Fifth Circuit, sitting en banc, carved out a sweeping exception to the exclusionary rule: "Henceforth in this circuit," the court announced, "when evidence is sought to be excluded because of police misconduct leading to its discovery,"[19] the evidence should be admitted when the conduct, even if "mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper."[20]

The *Williams* court tried to minimize both the novelty and the significance of its holding by claiming that the Supreme Court had already "all but explicitly adopted" an exception to the exclusionary rule for good faith violations of the fourth amendment,[21] and that its good faith exception would not "undercut the fourth amendment."[22] Indeed, the Fifth Circuit argued that its decision was not about the fourth amendment at all, but merely concerned the reach of the exclusionary rule,[23] which the court referred to as but one "device . . . for enforcing the amendment."[24] The court noted that it was simply restricting the rule's application "to conform . . . to its underlying purpose: to deter unreasonable or bad-faith police conduct."[25] This restriction, the court reasoned, would not affect the fourth amendment, because when the violation is made in good faith, "no deterrence is called for and none can be had."[26] Thus, the court concluded that "reason [as well as authority] plainly deman[d] explicit recognition of a good-faith exception" to the exclusionary rule.[27]

This article will seek to demonstrate that the *Williams* court is plainly wrong

14. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 424 (1971) (Burger, C.J., dissenting).

15. *See* notes 105-09 *infra* and accompanying text (discussing situations where the Supreme Court has declined to extend the exclusionary rule).

16. *See* note 104 *infra*.

17. The Bureau of National Affairs, for example, printed the entire text of the Fifth Circuit's en banc decision in *Williams* in the *Criminal Law Reporter*. *See* United States v. Williams, 27 CRIM. L. REP. (BNA) 3293 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). This distinction is generally reserved for Supreme Court opinions.

18. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

19. *Id.* at 846.

20. *Id.* at 847.

21. *Id.* at 841. Although the *Williams* court exaggerated when it stated that the Supreme Court has "all but explicitly adopted" the good faith exception, four of the justices then on the Court had, at one time or another, indicated that they would go along with some modification of the exclusionary rule along the lines of *Williams'* good faith exception. With the replacement of Justice Stewart by Justice O'Connor, there may well be a majority on the Court that favors modifying the rule. *See* note 32 *infra*.

22. 622 F.2d at 847.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 841.

Attorney General's Task Force on Violent Crime relied on *Williams* in its recent report recommending that Congress adopt a good faith exception.[31] Thus, it is reasonable to expect the Reagan administration to propose a modification of the exclusionary rule along the lines of *Williams*. In addition, perhaps the most ominous portent of the case's importance is that five justices of the Supreme Court, at one time or another, have indicated that they would adopt some form of a good faith exception.[32] Analysis of the *Williams* good

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poses to set up a commission to certify police departments. In order to qualify for certification, the department must establish procedures for handling police misconduct. Evidence will not be suppressed if an officer from a certified police department violates the fourth amendment. The only penalty for violations of the fourth amendment would be that the department would lose its certification. Assembly Const. Amendment 31, 1981-82 Sess. of the California Legislature.

Both houses of the Montana legislature passed a bill that would have abolished the exclusionary rule in state criminal proceedings, but Governor Ted Schwinden vetoed the bill. Nat'l L.J., June 8, 1981, at 1, col. 3. The bill would have subjected offending police officers to civil liability and to disciplinary action. These provisions prompted law enforcement officials to lobby Governor Schwinden to veto the bill, which he did. *Id.* at 32, cols. 1-2.

30. Some state courts have applied the good faith exception in limited circumstances, instead of adopting a broad rule as the Fifth Circuit did in *Williams*. *See* Richmond v. Commonwealth, No. 80-CA-1366-MR, slip op. at 9 (Ky. July 31, 1981) (search not unreasonable when conducted by police who had good faith belief that judicial officer from neighboring county had authority to issue warrant); People v. Adams, 442 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881 (1981) (evidence not suppressed when seized by police officer under mistaken belief that person who authorized search had actual authority to do so). Other courts have stopped short of adopting a good faith exception, but have cited *Williams* as the most recent development in exclusionary rule doctrine. *See* People v. Eichelberger, 620 P.2d 1067, 1071 n.2 (Colo. 1980) (en banc) (exclusionary rule not intended to prevent police from carrying out their duties when police action is reasonable); People v. Smith, 620 P.2d 232, 235 n.4 (Colo. 1980) (exclusionary rule exists to deter willful, flagrant actions by police, not reasonable, good faith ones); People v. Pierce, 88 Ill. App. 3d 1095, 1102, 1110, 411 N.E.2d 295, 301, 307 (1980) (*Williams* test of "reasonable and good faith belief by the police in propriety of their conduct" met by state). *But cf.* Holloman v. Commonwealth, 275 S.E.2d 620, 622 (Va. 1981) (although court persuaded by *Williams* logic, good faith exception not applicable when police search places that could not reasonably conceal objects of search).

31. *See* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 56-57 (August 17, 1981) (Attorney General should support, in both legislature and courts, position that evidence obtained in course of reasonable, good faith search not excluded from criminal trials) [hereinafter TASK FORCE REPORT].

32. Chief Justice Burger and Justice Rehnquist have suggested strongly that they are ready to scrap the exclusionary rule altogether. Dissenting from a denial of stay in California v. Minjares, 443 U.S. 916 (1979), they challenged the continued justification for the exclusionary rule and wrote that they would have asked the parties to brief the question whether it should be retained. *Id.* at 916-28 (Rehnquist, J., with Burger, C.J., dissenting from denial of stay). In another opinion, the Chief Justice called the rule a "Draconian, descredited device," Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring).

Justice Powell has written that he would favor a sliding scale approach to the exclusionary rule under which evidence obtained by "flagrant" fourth amendment violations would be excluded, but that obtained as a result of mere "technical violations" would not. Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., with Rehnquist, J., concurring in part).

Justice White, expanding on this theme, suggested in *Stone v. Powell* that the rule "should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for his belief." 428 U.S. 465, 538 (1976) (White, J., dissenting). Under White's approach, two requirements would have to be met before illegally-seized evidence would nonetheless be admissible: (1) the policeman must have acted with a good faith belief that his conduct was legal (a subjective test); and (2) he must have had a reasonable basis for such a belief (an objective test). *Id.* at 538-40. This is essentially the position adopted by the court in *Williams*.

At her nomination hearings before the Senate Judiciary Committee, Justice O'Connor refused to comment directly on how she would rule on a good faith exception. Because she expects the issue to be presented to the Court soon, she did not want to be accused of prejudging the issue. *Hearings Before the Senate Comm. on the Judiciary, Nomination of Sandra Day O'Connor*, 97th Cong., 1st Sess. 143 (Sept. 9, 1981) (unbound transcripts on file in Senate Document Room). She did testify, however, that evidence

on both counts; its sweeping good faith exception is contrary both to authority—for it is inconsistent with numerous Supreme Court precedents—and to reason—for it is premised on a naive and simplistic understanding of deterrence. Even though the Fifth Circuit is the only court to have adopted the good faith exception, the *Williams* decision, however obvious its defects, deserves careful study. Not only is Congress[28] now considering codifying some form of good faith exception, but the Colorado legislature has already enacted one,[29] and several courts have cited *Williams* with approval.[30] Moreover, the

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28. S. 101, 97th Cong., 1st Sess., 127 CONG. REC. S154 (daily ed. Jan. 15, 1981); S. 751, 97th Cong., 1st Sess., 127 CONG. REC. S2401-02 (daily ed. March 19, 1981).

S. 101, introduced by Senator Dennis DeConcini of Arizona, would prohibit suppression of evidence in a federal criminal proceeding unless the law enforcement official's violation of the fourth amendment was intentional or substantial. S. 101, § 3505(a). The bill provides for a court to determine whether a violation was substantial by considering whether the violation was reckless, whether suppression will deter future such violations, the extent to which privacy was invaded, and whether, but for the violation, the things seized would have been discovered. *Id.* § 3505(b). Senator Orrin Hatch of Utah and Senator Strom Thurmond of South Carolina introduced S. 751, which would abolish the exclusionary rule altogether. S. 751, § 3505. If a federal agent violates the fourth amendment, S. 751 authorizes the victim to sue the United States government directly. *Id.* § 2692. Although the bill authorizes recovery of actual and punitive damages up to $25,000, it denies punitive damages to victims who have been convicted of any offense for which the evidence was seized. *Id.* S. 751 would also legislatively overrule Bivens v. Six Unknown Named Agents of Federal Bureau of Investigation, 403 U.S. 388 (1971), by denying the victim a cause of action against the individual federal officer who violated his fourth amendment rights. S. 751, § 2694. Instead, the offending officer would be subject to disciplinary action by the agency for which he works, but only if the agency determines that the officer lacked good faith when he conducted the search. *Id.* § 2693.

A notable feature of both these bills is that they modify or abolish the application of the exclusionary rule in only federal criminal proceedings. There was no testimony regarding whether Congress has power to overrule by legislation the application of the exclusionary rule to the states.

At hearings held on both these bills, D. Lowell Jensen, Assistant Attorney General for the Criminal Division of the United States Department of Justice, testified that although the Department supports the "intentional or substantial violation" test of S. 101, it would prefer to see the good faith exception of *Williams* enacted. *Hearings Before the Subcommittee on Criminal Law of the Committee on the Judiciary, Hearings on S. 101 and S. 751, The Exclusionary Rule Bills*, 97th Cong., 1st Sess. 23, 25, 32 (1981). Jensen argued that *Williams* was constitutional, but conceded that the question whether Congress could constitutionally abolish the exclusionary rule is for the Supreme Court to decide. *Id.* at 33. Unlike Jensen, Steven R. Schlesinger, professor of politics at the Catholic University of America, objected to the enactment of a good faith exception, and endorsed instead enactment of a disciplinary action against offending police officers and a civil remedy to compensate victims. Schlesinger charged that the good faith exception would result in little or no deterrence, make fourth amendment law even more impenetrable by making fine distinctions between good and bad faith, and put a premium on the ignorance of police officers who would have to convince a judge that they were uninformed as to fourth amendment standards. *Id.* at 85. Stephen Sachs, Attorney General of Maryland and former United States Attorney for the District of Maryland, testified against both bills. He claimed that the exclusionary rule was of constitutional origin and consequently beyond the reach of Congress. *Id.* at 43. Although the good faith exception sounds like a benign and wholesome phrase, Sachs argued, each time unconstitutional behavior is excused under the exception, the "benchmarks of fourth amendment compliance will drop another notch." *Id.* at 52.

29. COLO. REV. STAT. tit. 16, art. 3, § 308 (signed into law by Gov. Richard Lamm on June 5, 1981; H.B. 1493, 53d General Assembly, 1st Sess., Session Laws of Colorado Chapter 188, amending article 3 of title 16, COL. REV. STAT. 1973, 1978 Replacement Volume) (copy on file at *Georgetown Law Journal*). Not only does the recently enacted Colorado statute adopt the good faith exception, it also makes voluntariness the only requirement for admission of a confession, presumably regardless of whether *Miranda* warnings had been given. *Id.*

Two state constitutional amendments are pending in California concerning the exclusionary rule. One of the amendments would prevent the exclusion of evidence on "independent state grounds" when the California Supreme Court has interpreted the state analog of the fourth amendment more narrowly than the United States Supreme Court has interpreted the federal right to privacy. S. Const. Amendment 7, 1981-82 Sess. of the California Legislature. The second proposed amendment to the California constitution would abolish the exclusionary rule in state criminal proceedings. The amendment pro-

faith exception, then, is not merely an evaluation of a lone case, but rather an analysis of what may be the next, and perhaps fatal, step in what Justice Brennan foresaw as the slow strangulation of the exclusionary rule.[33]

By examining both the exclusionary rule and *Williams*, this article will demonstrate that neither the Court, nor Congress, should take that step.[34] A good faith exception, far from having no effect on the fourth amendment, would have a devastating impact on its enforcement. If a good faith exception were implemented, criminal defendants would have no incentive to pursue novel fourth amendment claims, and even when such claims were raised, courts would not decide them. Thus, the exception would effectively choke off the development of fourth amendment law by any court that adopts it. The fourth amendment issues resolved in cases such as *Chimel v. California*,[35] *Katz v. United States*,[36] *Berger v. New York*,[37] *Delaware v. Prouse*,[38] and *Payton v. New York*[39] might never have been decided, or perhaps even litigated; all involved police misconduct that could have been excused under a good faith exception.

This article first sets the exclusionary rule in historical perspective, for though the *Williams* good faith exception is plainly inconsistent with Supreme Court precedent, its major premise—that the purpose of the rule is deterrence

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may not have to be excluded if standards were applied that take into account the good faith of police. *Id.* at 77-78 (Sept. 10, 1981). She testified that her understanding of the good faith exception is that it would apply when a police officer commits a "technical error," assumes he has a valid warrant that is ultimately determined to be invalid, or assumes he is operating under a case holding that has been overruled. *Id.* at 195 (Sept. 9, 1981). She also noted that the police officer's understanding of the particular facts involved should be taken into account. *Id.* The exclusionary rule may still have to be applied, she testified, if "force or trickery or some other reprehensible conduct has been used, but I have seen examples of the application of the rule which I thought were unfortunate on the trial court." *Id.* at 78 (Sept. 10, 1981).

33. *See* United States v. Peltier, 422 U.S. 531, 551 (1975) (Brennan, J., with Marshall, J., dissenting) (Court's opinion depends on understanding of exclusionary rule that "forecasts the complete demise" of rule); note 13 *supra* and accompanying text.

34. This article does not directly address the constitutionality of the good faith exception to the exclusionary rule, but only the wisdom of such an exception. If the defendant has a constitutional right not to be convicted with evidence illegally seized from him, as some commentators have argued and as some of the early Supreme Court cases suggest, then the exception is by definition unconstitutional because it would permit conviction on the basis of such evidence. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (essence of fourth amendment prohibits any use whatsoever of illegally-seized evidence); Weeks v. United States, 232 U.S. 383, 393 (1914) (to have value, language of fourth amendment must protect citizens from unlawful seizure and introduction into evidence of personal effects); Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 369 (1974) (defendant has personal constitutional right not to have illegally-seized evidence admitted against him); A.B.A. STATEMENT CONCERNING THE FOURTH AMENDMENT EXCLUSIONARY RULE 6 (June 1981) (submitted to the Attorney General's Task Force on Violent Crime) (statement of Prof. William W. Greenhalgh, Chairperson, Criminal Justice Section, Legislation Comm.) (federal exclusionary rule is requirement of due process; thus, legislative attempt to eliminate rule is facially unconstitutional) (copy on file at *Georgetown Law Journal*). Nevertheless, the Supreme Court has now clearly rejected the idea that the exclusionary rule vindicates the constitutional rights of the accused. The Court has held that the rule's sole purpose is to enforce the fourth amendment by deterring police misconduct. United States v. Janis, 428 U.S. 433, 446 (1976). Thus, any attack on the constitutionality of a good faith exception must take another direction. *See* note 100 *infra* (discussing *Janis* and outlining argument against constitutionality of good faith exception).

35. 395 U.S. 752 (1969).

36. 389 U.S. 347 (1967).

37. 388 U.S. 41 (1967).

38. 440 U.S. 648 (1979).

39. 445 U.S. 573 (1980).

of police misconduct is firmly grounded in recent Court decisions. This premise surely would have shocked the members of the unanimous Supreme Court that first formulated the fourth amendment exclusionary rule in *Weeks*. When the rule was conceived, it was not premised on deterrence at all, but on an amalgam of values, and was viewed as inextricably bound up with the fourth amendment itself. Thus, the Court originally saw the suppression of evidence as a necessary consequence of a fourth amendment violation. This notion, that the rule is compelled by the Constitution, has given way to the view that the rule is only necessary as a means of enforcing the protections of the fourth amendment. The Court has thus shifted and successively narrowed the rule's underlying rationales to the point that its sole justification is now seen as deterrence of police misconduct.

Second, the article discusses the exclusionary rule as a deterrent, and examines the level of deterrence that the exclusionary rule must generate in order to justify its continued application. The article will argue that because the exclusionary rule is applied to enforce fourth amendment rights, the probable cause requirement of the fourth amendment suggests a level of deterrence ample to justify the rule—that for every suppression of probative evidence, the rule must deter one unfruitful search. Although critics of the rule contend that the exclusionary rule does not satisfactorily deter police misconduct, this section of the article demonstrates that critics overlook the synergistic effects of a viable suppression system. Further, these critics argue that the exclusionary rule hampers effective law enforcement by "freeing the guilty," and suggest that a tort remedy would be a more appropriate sanction for police misconduct. These suggestions are disingenuous; an effective tort remedy would have an even greater negative impact on law enforcement, because such a remedy would deter more lawful police conduct than does the exclusionary rule, and an ineffective tort remedy would not offer any protection for fourth amendment rights.

The article next focuses on the decision in *United States v. Williams*, and argues that the Fifth Circuit's three principal justifications for adopting the good faith exception are invalid. First, it will demonstrate that the good faith exception does not affect merely the exclusionary rule, but rather diminishes the protections of the fourth amendment itself. It will then show that the exception strips the exclusionary rule of an important deterrent effect by permitting the introduction of illegally-seized evidence in situations when the rule would operate as a "general" or "systemic" deterrent. Finally, it will argue that the exception is not consistent with precedent, and is in fact contrary to several recent Supreme Court decisions, as well as the principles upon which the Court has traditionally resolved fourth amendment issues.

The article uses the *Williams* decision to illustrate the theoretical limitations of the good faith exception, and to highlight the tension and contradictions that the exception will cause in practice. A distressingly broad range of misconduct will be excused under the good faith exception, for use of the exception almost surely will change the fourth amendment standard for searches and seizures from probable cause to general reasonableness.

Finally, the article comments on how *Williams* mirrors a subtle, but revealing, shift in the criticism leveled at the exclusionary rule by its opponents.

Where formerly the rule was attacked because it failed to deter unlawful police conduct, now it is attacked because it deters unlawful conduct all too well. These opponents of the rule should be more candid: they should not mask their objection to an interpretation of the fourth amendment as an attack on the exclusionary rule.

II. *WILLIAMS* IN HISTORICAL PERSPECTIVE

Like most other provisions of the Bill of Rights, the fourth amendment is not self-executing;[40] it simply recognizes that the people have a right to be secure from unreasonable searches and seizures.[41] The first clause of the amendment commands that this right "shall not be violated," and the second requires that warrants "shall issue" only when specifically limited in scope and supported by a minimum quantum of evidence—probable cause.[42] Nowhere does the fourth amendment prescribe, however, what consequences must follow from a search or seizure that is either unreasonable or conducted in violation of the warrant requirement.

Thus, if the fourth amendment's protections are to be enforced, they require a remedy that will guarantee the rights granted by its language. Because the amendment itself provides no enforcement mechanism, a court called upon to enforce the amendment's protections apparently would have to resolve two separate issues. First, it would have to determine whether a fourth amendment violation had occurred. This determination would require the court to delineate the contours of the right itself, not only by analyzing the relationship between the amendment's two main clauses,[43] but also by giving content to its

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40. It was many years before the courts developed mechanisms to enforce most of the provisions of the Bill of Rights. The fourth amendment, like the other provisions, did not even arguably apply to the states until the fourteenth amendment was adopted in 1868, *see* Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855) (Constitution restrains only issuance of warrants under federal law and has no application to state process), and during the nineteenth century there were relatively few federal criminal prosecutions. *See* note 47 *infra* and accompanying text. Moreover, the Supreme Court did not take much interest in state criminal prosecutions until the 1930's. Thus, the fact that the exclusionary rule was not formulated until 125 years after the Constitution's ratification, and not applied to the states until 1961, should be of little significance in assessing its legitimacy or its value. *See* Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 74-75 (1978) (discussing relatively recent development of remedies for constitutional violations).

41. *See* note 2 *supra* (text of fourth amendment).

42. *Id.*

43. In attempting to define the relationship between these two clauses, the Court has misread the amendment's history. The Court has suggested that the purpose of the warrant clause was to establish a procedural mechanism for safeguarding individual privacy rights; that is, as a way of minimizing the likelihood that the unreasonable searches prohibited by the first clause will occur. *See generally* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-46 (1969). History demonstrates, however, that the seeds of the fourth amendment, first sown in England and then transplanted to the colonies, grew out of a fear of arbitrary searches and seizures conducted pursuant to "general warrants" which authorized their bearers to search broadly and at will for evidence of crime. *Id.* at 38-44. In eighteenth century England, the typical purpose of the general warrant was to root out those suspected of seditious libel. *Id.* at 25-26. The two leading pre-revolutionary English cases striking down such warrants were Wilkes v. Wood, 19 Howell's State Trials 1153 (1763), and Entick v. Carrington, 19 Howell's State Trials 1029 (1765). The English exported these general warrants to the colonies in the form of writs of assistance, which the King's customs officials used widely to search private premises and seize smuggled goods. T. TAYLOR, *supra*, at 35-36. These searches and seizures, made pursuant to such general warrants, constituted the evil at which the framers directed the protections of the fourth amendment. *Id.* at 35-43.

This intent is evident from the original draft of the amendment, which reads, "The right of the

essential terms: "search," "seizure," "unreasonable," and "probable cause."[44]

people to be secured [sic] in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." 1 ANNALS OF CONGRESS 783 (1789), *quoted in* 1 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 1.1, at 5 (1978) [hereinafter LAFAVE, SEARCH AND SEIZURE]. A substantial majority of the delegates voted down the amendment as originally proposed. *Id.* Nevertheless, Representative Benson, the author of the rejected language, succeeded in sneaking his language back into the proposed amendment and the full Congress approved it in that form. *Id.* For a thorough account of the origins of the fourth amendment, see J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT ch. 1 (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1970).

Although the Court has misread the fourth amendment's history with respect to the purpose of the warrant clause, it has, in light of that history, correctly interpreted the probable cause requirement of the amendment as establishing the threshold test for reasonableness of searches and seizures made with or without a warrant. *See* note 43 *infra* (arguing that probable cause is prerequisite to fourth amendment reasonableness). Fearful of both the arbitrariness and the breadth of the writs of assistance, the framers adopted the fourth amendment with a dual intent: the purpose of the probable cause requirement was to ensure that searches and seizures had an adequate basis in fact; the purpose of the particularity requirement was to guarantee that they were limited in scope to the persons or things to be seized.

44. The thesis of this article rests in part on the premise that probable cause is a prerequisite to fourth amendment reasonableness, at least in the context of arrests and most searches (as opposed to stops and frisks). The Supreme Court has stated clearly and repeatedly that probable cause is required to support an arrest or, with few exceptions, a search. *E.g.*, United States v. Watson, 423 U.S. 411, 423-24 (1976); Carroll v. United States, 267 U.S. 132, 162 (1925), *cited with approval in* Brinegar v. United States, 338 U.S. 160, 175-76 (1949); *see* note 118 *infra* (discussing exceptions). Although the framers did not intend the warrant clause to act as a procedural mechanism for preventing unreasonable searches and seizures, they apparently did intend to forbid all searches and seizures made without probable cause. *See* T. TAYLOR, *supra* note 43, at 38-44. At the time of the amendment's adoption, no officials in this country or in England even contemplated entering and searching a house without a warrant. Although arrests could be made in public without a warrant, they had to be based on probable cause. This requirement raised no problems, however, because at that time arrests almost invariably were made after hot pursuit or following a hue and cry, and so were supported by very strong evidence. *Id.* at 27-29. Warrantless searches incident to arrest apparently were routine and did not evoke the fear or concern that accompanied the exercise of the general warrant. *Id.* at 27-29, 39, 43. Thus, searches made pursuant to general warrants issued on less than probable cause were not only what the framers feared most, they were, generally speaking, the only non-probable cause searches and seizures likely to occur at that time.

Surely only a bizarre interpretation of the amendment, either as adopted or proposed, would yield the anomalous result of on the one hand requiring probable cause for the issuance of a warrant, and yet on the other hand permitting warrantless searches on less than probable cause. To its credit, the Supreme Court plainly has rejected any such interpretation. *See* Wong Sun v. United States, 371 U.S. 471, 479 (1963) (whether or not requirements of reliability or particularity of information on which officer may act are more stringent when warrant absent, they surely cannot be less stringent than when warrant obtained); Henry v. United States, 361 U.S. 98, 104 (1959) (although *Carroll* relaxed requirements for warrant on grounds of practicality, did not dispense with need for probable cause); *cf.* Delaware v. New York, 442 U.S. 200, 208 (1979) (probable cause standard represents accumulated wisdom of precedent and experience and defines minimum justification necessary to make amount of intrusion involved in arrest "reasonable" under fourth amendment); Brinegar v. United States, 338 U.S. 160, 176 (1949) ("long-prevailing" standard of probable cause embodies best compromise for accommodating often opposing interests in safeguarding citizens from rash and unreasonable interferences with privacy and in "seeking to give fair leeway for enforcing the law in the community's protection"). *See also* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.1, at 439; J. LANDYNSKI, *supra* note 43, at 42-43; Saltzburg, *Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 159-63 (1980).

In a forthcoming article, Professor Posner argues that the exclusionary rule should be scrapped, and that the fourth amendment should be viewed simply as subjecting the police (and their governmental employers) to tort liability for unreasonable searches and seizures. R. Posner, Rethinking the Fourth Amendment 1-2 (Sept. 22, 1981) (unpublished) (copy on file at *Georgetown Law Journal*). Under Posner's approach, a search or seizure would not be unreasonable simply because it was made without probable cause; rather, the test in all cases would be whether the benefits to society reasonably expected to flow from the search and seizure outweighed the anticipated costs to legitimate privacy interests. *Id.* at 26-32. A criminal's interest in avoiding detection and conviction for his commission of a crime

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a new metropolitan constabulary
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Second, the court would need to decide what consequences should attach when the government carries out an unreasonable search, however defined. Although such a two-step inquiry might seem to have been required, the Supreme Court, in its early encounters with the provision, did not divide its analysis in this manner. Only within the last thirty years has the Court bifurcated its fourth amendment analysis into two distinct inquiries.[45]

For almost 125 years after the adoption of the Bill of Rights, the courts entertained virtually no suits, either civil or criminal, brought under the fourth amendment. During that period, the amendment applied only to the federal government,[46] which in those simpler times had few laws and only a small contingent of agents to enforce them.[47] Even at the state and local levels, the first organized police forces did not appear until well into the nineteenth century.[48] Moreover, there were, of course, no telephones to tap or electronic bugs

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would not be counted as such an interest. *Id.* at 4-5. Moreover, Posner would apparently impose no constitutional limits on the legislative power to authorize arrests or searches (as long as they were warrantless!) on less than probable cause. *Id.* at 30-32. In other words, the legislature could, consistent with the Constitution, empower the police to search, arrest, and interrogate on the slightest suspicion. The victim of a particular search, however, would still be entitled to relief in a tort action if he could show that the search was "unreasonable" because its anticipated costs to privacy interests outweighed the anticipated benefits to society. Posner suggests that these costs and benefits would then be weighed by the jury.

There are both practical and doctrinal defects in this proposal. How, for example, are the aoristic benefits to society of apprehending someone who has committed a particular crime to be weighed by the police, and later the jurors? Are they to consider, and put a monetary value on: the likelihood and severity of future criminal conduct by the suspect, the likelihood of his rehabilitation if he is apprehended, the gain in general deterrence if he is caught, the demoralization costs to the victim and others if he is not caught, and so on? Can we really trust the police and juries to put a value on other people's privacy, particularly when those who are most likely to be subject to coercive and intrusive police action are members of minority groups, and thus are least able to protect themselves through the political process?

Moreover, because society collectively determines what conduct should be made criminal and the "seriousness" of particular crimes, it is hard to see why, on a purely cost-benefit analysis, the Constitution should be seen as imposing any anti-majoritarian limits on the legislature's power to authorize coercive police conduct aimed at preventing crime. Indeed, even the third degree may be reasonable, that is, cost-effective, on some occasions. The reason that a simple majority cannot institute a police state is not that it is uneconomic, but rather that it is prohibited by provisions of the Bill of Rights, most importantly by the fourth amendment.

Posner contends, however, that the probable cause requirement of the warrant clause does not stand in the way of his proposal, arguing that the clause should not be read as setting the standard for arrests and searches without a warrant. *Id.* at 30. He maintains that the warrant clause would not be superfluous even if its specific requirements did not apply to warrantless searches because the police still would need a common law or statutory basis to make a warrantless arrest or search. *Id.* at 28 n.56. The warrant clause, on this reading, simply ensures that where the basis for the arrest or search is a warrant, the requirements of the warrant clause will be met. Posner also argues that the clause prevents the police from "a more secure defense of legal process" where a search is conducted pursuant to a warrant. *Id.* This fails to explain, however, why the warrant clause should require a fixed quantum of proof—probable cause—to support a warrant, if the reasonableness requirement of the first clause does not also presuppose probable cause for warrantless searches or seizures. Posner recognizes that the acceptance of his interpretation will depend on the weight given to the principle of stare decisis in the fourth amendment area. *Id.* at 2.

45. The Court first undertook this bifurcated analysis of fourth amendment questions in Wolf v. Colorado, 338 U.S. 25, 28-32 (1949).

46. The fourth amendment was not applied to the states until Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

47. *See* California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) (list of federal criminal statutes has greatly expanded).

48. The modern police system originated in 1829 when Sir Robert Peel, as Home Secretary, initiated a new metropolitan constabulary pursuant to a Parliamentary Bill authorizing the action. V. FOLLEY, AMERICAN LAW ENFORCEMENT 61 (1980). The new force stressed discipline, semi-military organiza-

to plant. Nineteenth-century law enforcement officers could not base their arrests on other standard twentieth-century investigative techniques such as fiber analysis, photographic identifications, or information transmitted by police radio. Instead, arrests were almost invariably made on or near the scene of the crime in response to a "hue and cry,"[49] and there were few fourth amendment challenges to police determinations of probable cause.[50]

The turn of this century, however, brought a rapid proliferation of federal criminal laws, and with it, a vast increase in the number of searches, seizures, and federal criminal prosecutions.[51] Increasingly, defendants sought to preclude the government from using against them evidence obtained through allegedly-unconstitutional searches or seizures conducted by its agents. Thus, both the task of defining the scope of fourth amendment rights and of determining how such rights were to be enforced arose in the context of federal criminal prosecutions.

It was in this context that the Supreme Court, rebelling against the notion that it should sanction unconstitutional searches, ruled that the government may not use evidence obtained through the misconduct of its agents. When this "exclusionary rule" was first formulated in *Weeks v. United States*,[52] it was

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tion and operation, and high-quality staff. *Id.* Headquartered on a small side street called "Scotland Yard," the constables' effective operation quickly gained the esteem and respect of an initially wary public. *Id.* at 62-63. The members of the force soon became known as "peelers" or "bobbies" out of respect for Sir Robert Peel. *Id.* at 63.

The first American police officers were parish constables, appointed during colonial rule. *Id.* at 67. Because America was predominantly rural until the twentieth century, municipal police departments grew slowly. Initially, cities were concerned primarily with security during the evening hours, and as they grew, they established routinized night watches. *Id.* at 67-68. Boston founded the first night watch in 1636, with similar forces arising in New York in 1658, and in Philadelphia in 1700. *Id.* at 70. Not until the mid-1800s did American cities, following the British pattern, institute daytime police patrols. *Id.*

49. W. SHEPPARD, THE OFFICES OF CONSTABLES ch. 8, § 2, no. 4 (London. c. 1650), *quoted in* T. TAYLOR, *supra* note 43, at 39.

50. Until fourth amendment privacy was held to be enforceable against the states in Wolf v. Colorado, 338 U.S. 25 (1949), fourth amendment "probable cause" issues could only arise when federal officials were involved or under state constitutions with a probable cause requirement. *Id.* at 28.

51. Prior to the turn of the century, only three cases contesting substantive fourth amendment issues reached the Supreme Court. This may have occurred simply because the Court's appellate jurisdiction was not expanded to include any criminal cases until 1891. *See* 26 Stat. 826, § 5 (1891) (conferring Supreme Court jurisdiction over "cases of conviction of a capital or otherwise infamous crime"). *See also* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3503, at 8 (1975) (no Supreme Court review of federal criminal cases under Judiciary Act of 1789). Of the 25 cases involving searches and seizures that the Supreme Court decided between *Weeks* and the repeal of prohibition in 1933, 24 of them involved gambling, bootlegging, or narcotics offenses. Harris v. United States, 331 U.S. 145, 175-81 (1947) (Frankfurter, J., with Murphy & Rutledge, JJ., dissenting).

52. 232 U.S. 383 (1914). Among the items seized were books, letters, bonds, mining certificates, an old newspaper, clothes, candy, and a tin box. *Id.* at 387. The property was taken by the government to be used for evidence in its prosecution of the defendant for unlawful use of the mails to transmit lottery tickets. *Id.* at 388. Only the letters, however, were introduced at trial. *Id.* at 394.

Weeks was the first case in which the Court excluded evidence solely on fourth amendment grounds. In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court excluded evidence acquired in violation of the defendant's fourth and fifth amendment rights. *Id.* at 633-35. The Court held unconstitutional a statute that forced a person to produce, upon court order, any document that might tend to prove a non-criminal allegation by the government of the violation of a revenue law, or else have the allegation taken as confessed. *Id.* Although the law technically applied to civil proceedings, the Court found that it fell within the fourth and fifth amendments because its provision for forfeiture and penalties were of a quasi-criminal nature. *Id.* at 634. The Court grouped the fourth and fifth amendments

not a consciously chosen device for deterring fourth amendment violations.[53] Rather, it was simply the the natural outgrowth of the prevalent form of litigation, federal criminal prosecutions, which consistently raised fourth amendment issues.

There were several distinct normative principles underpinning the *Weeks* exclusionary rule: first, that it was simply unfair to convict a defendant on the basis of evidence unlawfully seized from him;[54] second, that it was an addi-

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together because "the seizure of a man's private books and papers against him is [not] substantially different from compelling him to be a witness against himself." *Id.* at 633.

Before *Weeks*, only one state excluded evidence obtained in violation of a state constitutional provision prohibiting unreasonable searches. State v. Sheridan, 121 Iowa 164, 96 N.W. 730 (1903), *cited in* Wolf v. Colorado, 338 U.S. 25, 34 app. (1949). In the 35 years between *Weeks* and *Wolf*, 16 states chose to follow the *Weeks* rule, while 30 states rejected it. Wolf v. Colorado, 338 U.S. at 29.

Otherwise admissible evidence may also be excluded for other reasons, for example: (1) to protect the defendant's fifth amendment privilege against self-incrimination, *see* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (accused must be effectively apprised of rights during in-custody interrogations to combat inherent pressures to incriminate himself); Rogers v. Richmond, 365 U.S. 534, 543–44 (1961) (admissibility of defendant's confession dependent upon whether law enforcement officials compelled confession, not upon truthfulness of confession); (2) to protect the defendant's sixth amendment right to counsel, *see* Brewer v. Williams, 430 U.S. 387, 394-95, 406 (1977) (affirming exclusion of evidence obtained through self-incriminatory statements elicited in violation of defendant's right to counsel); (3) to safeguard a defendant's due process right to avoid conviction based on unreliable identification, *see* Manson v. Brathwaite, 432 U.S. 98, 112-14 (1977) (reliability of identification assessed by examining totality of circumstances); Stovall v. Denno, 388 U.S. 293, 302 (1967) (due process denied by confrontation unmistakably suggestive and conducive to mistaken identity); (4) to protect rights created by state constitutional provisions, *see* State v. Kaluna, 55 Hawaii 361, 369-71, 520 P.2d 51, 58-59 (1974) (protections of Hawaii Bill of Rights can be extended beyond parallel provisions of federal Bill of Rights; affirming order suppressing drugs seized in pre-incarceration search for weapons because packet containing drugs searched out of curiosity); (5) to ensure rights mandated by a federal statute, *see* 18 U.S.C. § 2515 (1976) (prohibiting use of evidence seized outside scope of statutory scheme regulating wiretapping); or (6) as an exercise of a court's supervisory powers. *See* McNabb v. United States, 318 U.S. 332, 341-42 (1943) (evidence acquired through involuntary confession excluded in exercise of Court's supervisory authority over administration of criminal justice in federal courts).

This article is concerned only with the exclusion of evidence obtained in a search or seizure that violated the fourth amendment to the United States Constitution, and the term "exclusionary rule" shall be used to refer only to such evidence.

53. Justice Holmes summarized the premise behind an exclusionary policy in a simple proposition: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired should not be used before the Court, but that it should not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). During its early stages, the reach of the exclusionary rule was broad. In *Silverthorne*, for example, the Court held invalid grand jury subpoenas because they were based on knowledge obtained from illegally-seized evidence. *Id.* at 392.

54. *See generally* Schrock & Welsh, *supra* note 34, at 257-60. Founding their position upon a "unitary model" of government, the authors stress that a court's admission of evidence derived from the improper conduct of police makes the judiciary "vicariously responsible" for the executive's wrong. *Id.* at 258, 260. The entire government has thus denied a "fair prosecution" to a defendant. *Id.* at 258. The authors rely mostly upon the dissenting opinions of Justices Holmes and Brandeis in *Olmstead v. United States*. *See* note 56 *infra*. They argue, however, that those dissenting opinions merely make "vivid the unitary thinking pioneered in *Weeks*." Schrock & Welsh, *supra*, at 255 n.25.

Even among judges who at other times may have expressed skepticism about the exclusionary rule, this "unitary thinking" may have its appeal. In Crews v. United States, 369 A.2d 1063 (D.C. 1977), *rev'd*, 389 A.2d 277 (D.C. 1978) (en banc), *rev'd*, 445 U.S. 463 (1980), Judge Stanley S. Harris noted both the "social costs" of the exclusionary rule, and its "limited efficacy" as a deterrent. *Id.* at 1069 n.7. Recently, in Smith v. Whitehead, No. 79-526 (D.C. Sept. 10, 1981), Judge Harris dissented from the majority's affirmance of a jury award of damages in an action in conversion that was brought against several police officers. The officers, while executing a search warrant for drugs and evidence of drug dealing, seized large numbers of household items from a private home. *Id.*, slip op. at 3-5. Because the officers, whether or not correctly, believed that the property had been received as payment for drugs, and hence could be used as evidence in court, Judge Harris concluded that the police lacked the intent necessary for conversion. *Id.* at 35 (Harris, J., dissenting). In his view, they were merely acting as agents of the judiciary. He wrote: "As officers seizing items pursuant to a search warrant, they acted on

tional unlawful invasion of his privacy to admit such tainted evidence at his trial;[55] third, that the government should not be able to profit from the wrongdoing of its agents;[56] and fourth, that the integrity of the federal courts should not be compromised through the admission of unlawfully-seized evidence.[57]

As long as the fourth amendment governed only the conduct of federal officials, these principles coexisted harmoniously, and the Court had no need to consider their relationship. When the Court attempted to apply the fourth amendment to the states, however, this harmony was shattered. The dissonance resulted from the Court's severing the inquiry into whether the government had violated the defendant's fourth amendment rights from that of whether to apply the exclusionary rule.

In *Wolf v. Colorado*,[58] the Supreme Court for the first time ruled that the core value protected by the fourth amendment—"the security of one's privacy

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behalf of the court which authorized the warrant. . . . [T]hey intended merely to seize evidence on behalf of the court for possible use in a criminal prosecution." *Id.* (citation omitted). If the police are judicial agents when they conduct seizures—at least those pursuant to a warrant—then the illegal conduct of the police should be imputed to the courts, unless they disavow the officers' actions through exclusion of evidence. Thus, Judge Harris has unwittingly articulated the philosophical basis for a theory of the exclusionary rule not grounded on deterrence.

55. The early exclusionary rule cases generally involved the illegal seizure of private papers. *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (grand jury subpoena based on illegally-seized papers held invalid); Weeks v. United States, 232 U.S. 383, 398 (1914) (letter seized illegally from defendant by federal official without warrant); Boyd v. United States, 116 U.S. 616, 638 (1886) (notice to produce invoices held erroneous and unconstitutional). Exclusion of evidence to preserve personal privacy, however, lost much of its appeal as evidence challenged by motions to suppress tended increasingly to be either contraband or stolen property. This precept was explicitly rejected by the Court in United States v. Calandra, 414 U.S. 338, 347 (1974) (purpose of exclusionary rule not to remedy invasions of individual privacy, but rather to deter future unlawful police conduct). *See* notes 95-98 *infra* and accompanying text (discussing *Calandra*).

56. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (government prevented not only from presenting unlawfully seized papers in evidence against defendant, but also from using information acquired from papers). In his dissent in *Olmstead v. United States*, Justice Brandeis wrote what is perhaps the most memorable statement of this principle:

> If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In a separate opinion, Justice Holmes agreed with Justice Brandeis that the government should not profit from its criminal acts: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Id.* at 470 (Holmes, J., separate opinion).

57. The *Weeks* Court stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting the accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392. After the fourth amendment was applied to the states, the Court relied on the "imperative of judicial integrity" to prevent the introduction of evidence, unlawfully seized by state officials. *See* note 75 *infra* and accompanying text.

58. 338 U.S. 25 (1949). Though you would not know it from the five rather abstract and antiseptic opinions that the sharply divided Supreme Court produced in *Wolf*, the case involved the prosecution of a physician for conspiracy to commit abortion. The evidence against him included appointment books seized from his office. Wolf v. People, 117 Colo. 279, 281, 187 P.2d 926, 927 (1947), Wolf v. People, 117 Colo. 321, 322, 187 P.2d 928, 929 (1947), *aff'd*, 338 U.S. 25 (1949).

against arbitrary intrusion by the police"[59]—was "implicit in the concept of ordered liberty and as such enforceable against the states through the Due Process Clause" of the fourteenth amendment.[60] The Court ruled, however, that the Constitution did not require a state to enforce this right through the exclusionary rule.[61] Although the Court had originally considered the rule an essential ingredient of the fourth amendment, the majority in *Wolf* reduced the status of the rule to merely "a matter of judicial implication,"[62] and "remanded" those defendants aggrieved by unconstitutional police conduct to "such protection as the internal discipline of the police, under the eyes of an alert public opinion may afford."[63]

The Court's analysis in *Wolf* introduced new concepts that created intolerable tensions between state and federal law.[64] To begin with, by applying the fourth amendment to the states, the Court greatly extended the range of government officials subject to the fourth amendment and concomitantly expanded the right of people to be secure from unreasonable searches and seizures. At the same time, however, the Court left to the police themselves the responsibility for seeing to it that those rights were respected. In short, the Court created rights, but provided no remedy for their enforcement.

Moreover, the Court for the first time injected the instrumental rationale of deterrence of police misconduct into its discussion of the exclusionary rule.[65] At the same time, however, it made clear that it did not view this rationale as compelling.[66] Furthermore, by using the empirically-based, consequentialist rationale of deterrence as support for its refusal to apply the exclusionary rule to the states, the Court necessarily undercut one normative theme of the rule: that the accused has a personal due process right not to be convicted with evidence seized from him in violation of the Constitution. For if there were such a right, it should be equally available to state and federal defendants, all

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59. 338 U.S. at 27.

60. *Id.* at 27-28. The Court did not incorporate at once the whole of the fourth amendment into the fourteenth amendment. The Court in *Wolf* took the first step. The range of the fourth amendment interests encompassed by *Wolf* remained unclear, however, until the Court ruled in Ker v. California, 374 U.S. 23 (1963), that the fourth amendment applied with full force to the states, and that the constitutional standards governing federal officials also apply to state officials. *Id.* at 33. Until it extended the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961), there were simply no cases requiring the Court to elucidate just what constraints the fourth amendment imposed on state officials through the fourteenth amendment. This tends to bear out the thesis of this article: without the exclusionary rule, the contours of the fourth amendment remain undeveloped.

61. 338 U.S. at 33. Prior to *Wolf*, several states had provisions similar to the fourth amendment. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 132-33 (1973). Some of these states enforced their fourth amendment surrogates with judicially-created exclusionary rules. *See* Wolf v. Colorado, 338 U.S. at 34-38 (Tables B, D, F, I) (setting forth cases in which states adopted exclusionary enforcement measures). By leaving enforcement of the fourth amendment to the states, *Wolf* did not alter the states' practices regarding the exclusionary rule.

62. 338 U.S. at 28.

63. *Id.* at 31.

64. *See* Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 5 (*Wolf* contained "seeds of its downfall"; Court recognized broad federal right but relegated it to "tender mercies" of states for enforcement).

65. 338 U.S. at 31.

66. Although the Court recognized that "in practice the exclusion of evidence may be an effective way of deterring unreasonable searches" it concluded that "incidence of such conduct by [state] police [may be] too slight to call for" the remedy of exclusion, and that the "public opinion of a community" may exert sufficient influence on the police. *Id.* at 31-32.

of whom enjoy the protections of due process. Thus, by driving a wedge between the fourth amendment and the exclusionary rule, the Court in *Wolf* dealt the rule a blow from which it has never recovered. Although the Court said that it "stoutly adhere[d] to" the exclusionary rule of *Weeks*,[67] it never adequately explained why, if the rule was unnecessary for the enforcement of fourth amendment rights in state courts, it was indispensible in federal courts.

The tension implicit in *Wolf* soon became unbearable. As the federal courts continued to expand the range of fourth amendment protections in the course of deciding exclusionary rule cases, the gap between federal and state privacy rights began to widen. In those states whose courts did not apply the exclusionary rule, the privacy rights protected by the fourth and fourteenth amendments remained undeveloped. As a result, while federal law enforcement agencies responded by modifying investigatory practices to conform to evolving fourth amendment standards, in states without an exclusionary rule egregious and premeditated official misconduct continued; neither the "internal discipline" of the police nor "the eyes of an alert public opinion" proved sufficient to protect those most likely to be victimized by police lawlessness.[68] Several states adopted the exclusionary rule on their own initiative,[69] realizing that if the command of the Constitution was to be enforced against state officers, it would have to be enforced through the exclusionary rule.

Even in the Supreme Court, the erosion of *Wolf* began almost as soon as it was announced.[70] In *Rochin v. California*,[71] the Court held that an exclusionary rule, grounded in the due process clause of the fourteenth amendment, applied in state criminal prosecutions to evidence obtained through police misconduct "so brutal and so offensive to human dignity"[72] that it "shocks the

67. *Id.* at 28.

68. *See* Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 323-24 (prior to *Mapp*, fourteenth amendment search and seizure guarantees were not protected by states). In states without an exclusionary rule, defendants had no way to object to the admission of evidence on the ground that it had been seized in violation of their fourth amendment rights. Some particularly offensive seizures, however, were challenged on due process grounds. One such case was Irvine v. California, 347 U.S. 128 (1951). In *Irvine*, the defendant sought suppression of evidence obtained by the police when they bugged his home. Acting without a search warrant or probable cause, the police had made repeated covert entries into Irvine's home and had concealed microphones in various places with the hope that they would overhear incriminating statements. *Id.* at 131. In one instance, the transmitter was placed in the defendant's bedroom. *Id.* The Supreme Court affirmed the petitioner's conviction: because there had been no coercion, there was no denial of due process. *Id.* at 133, 138 (plurality opinion). At the suggestion of Justice Jackson and Chief Justice Warren, *id.* at 138, the FBI investigated the case for possible federal prosecution of the officers. The investigation revealed that the officers had been acting under orders of the Chief of Police and with full knowledge of the local prosecutor. Note, *State Police, Unconstitutionally Obtained Evidence and Section 242 of the Civil Rights Statute*, 7 STAN. L. REV. 76, 94 n.75 (1954). It was cases like *Irvine* that led the California Supreme Court to adopt the exclusionary rule in People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955). *See* Traynor, *supra*, at 324 (in period between *Irvine* and *Cahan* it became clear that California had to adopt exclusionary rule).

69. *See* Elkins v. United States, 364 U.S. 206, 224-32 (1963) (listing state court decisions on admissibility of unlawfully-seized evidence); People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955) (adopting exclusionary rule in California).

70. *See generally* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 629 (Supreme Court made inroads into *Wolf* just a few years after it was decided). Mr. Geller's article provides an excellent discussion of the arguments that have been made for and against the exclusionary rule.

71. 342 U.S. 165 (1952).

72. *Id.* at 174.

conscience."[73] Soon thereafter, in *Elkins v. United States*,[74] the Court forbade the use in federal prosecutions of evidence unlawfully seized by state police officers, thereby rejecting the "silver platter doctrine."[75] Notably, *Elkins* was the first case to be decided explicitly on the deterrence rationale.[76]

Ultimately, in *Mapp v. Ohio*,[77] the Court tried to repair the damage by overruling *Wolf* and applying the exclusionary rule to the states.[78] Yet where the

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73. *Id.* at 172. In *Rochin*, three Los Angeles deputy sheriffs entered Antonio Rochin's home through an open outside door during the course of a narcotics investigation. *Id.* at 166. The officers forced open a bedroom door and found Rochin and his wife. *Id.* The officers saw two capsules on a night stand. *Id.* When the deputies asked "Whose stuff is this?" Rochin grabbed the capsules and swallowed them. *Id.* The three officers unsuccessfully tried to extract the capsules from Rochin's mouth. *Id.* They then handcuffed Rochin and took him to a hospital. *Id.* At the direction of one of the officers a doctor forced a tube down Rochin's throat against Rochin's will, and funneled an emetic solution into his stomach inducing vomiting. *Id.* Two capsules were recovered from the vomit, and were found to contain morphine. *Id.*

Though it decided *Rochin* on due process grounds, the Court for the first time applied an exclusionary rule to tangible evidence seized by state officials. Cases coming soon after *Rochin* demonstrated the difficulties with the "shocks the conscience" test. *See* Breithaupt v. Abram, 352 U.S. 432, 437 (1957) (blood test taken while suspect unconscious does not shock conscience); Irvine v. California, 347 U.S. 128, 133 (1954) (*Rochin* involved element of physical coercion—use of stomach pump—not found in illegal surveillance of defendant's home).

Justice Frankfurter, who authored the opinions in both *Rochin* and *Wolf*, dissented in *Irvine*. 347 U.S. at 142 (Frankfurter, J., with Burton, J., dissenting). *Irvine* may have made the demise of *Wolf* inevitable, because to many, it demonstrated the ineffectiveness of diluted forms of the *Weeks* exclusionary rule. *See* Traynor, *supra* note 68, at 324 (decision in *Irvine* evinced Supreme Court's desire for states to implement an exclusionary rule).

74. 364 U.S. 206 (1960).

75. *Id.* at 223. In Byars v. United States, 273 U.S. 28 (1927), the Court had ruled inadmissible in a federal prosecution the fruits of a search conducted by state and federal officers pursuant to a state search warrant that was defective by federal standards. *Id.* at 29-30. Nevertheless, the Court made it clear that participation by federal officials was crucial to the decision. The Court did "not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." *Id.* at 33. According to Justice Stewart's majority opinion in *Elkins*, the Court had removed the doctrinal underpinning for admitting evidence unlawfully seized by state officials in federal prosecutions in *Wolf*, when it held that the fourth amendment prohibition against unreasonable searches and seizures applied to the states through the fourteenth amendment. *Id.* at 213. Justice Stewart wrote:

> For by admitting the unlawfully seized evidence the federal court serves to defeat the state's [that adopted the exclusionary rule on its own] effort to assure obedience to the Federal Constitution. In states which have not adopted the exclusionary rule, on the other hand, it would work no conflict with the local policy for a federal court to decline to receive evidence unlawfully seized by state officers.

Id. at 221. Justice Frankfurter, the author of *Wolf*, dissented. He viewed it as:

> [A] complete misconception of the *Wolf* case to assume, as the Court does as the basis for its innovating rule, that every finding by this Court of a . . . search unreasonable under the Fourth Amendment, constitutes an "arbitrary intrusion" of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment.

Id. at 238 (Frankfurter, J., with Clark, Harlan & Whittaker, JJ., dissenting).

76. *Id.* at 217. The Court stated: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.*

77. 367 U.S. 643 (1961).

78. *Id.* at 655. The Court reasoned that:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the . . . States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be a "form of words," valueless and undeserving of mention in a perpetual

Court had once perceived a kind of natural, immutable affinity between the fourth amendment and the rule, since *Wolf* the Court has seen the relationship between them as the product of judicial artifice, and the rule itself as a judicial construct requiring explicit, pragmatic justification if it is to survive. Thus, although the Court in *Mapp* invoked a concatenation of normative principles to support the extension of the exclusionary rule to the states,[79] the bulk of its opinion was devoted to a defense of the rule on the empirical basis that it has proved to be the only effective means of enforcing the fourth amendment.

Soon after *Mapp*, the Court deterrence as the preeminent purpose of the exclusionary rule. In *Linkletter v. Walker*,[80] the Court declined to apply *Mapp* retroactively:[81] "The misconduct of the police prior to *Mapp* has already occurred and will not be deterred by releasing the prisoners involved. . . . [T]he ruptured privacy of the victims' homes and effects cannot be restored."[82] Although after *Linkletter* deterrence was the dominant purpose of the rule, the Court nevertheless continued to recognize that it also served other purposes, and in *Terry v. Ohio*[83] ringingly proclaimed judicial integrity as a basis for the rule.[84]

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charter of inestimable human liberties, so too, without the rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus . . . .

Id.

79. In support of its application of the exclusionary rule to the states through the due process clause of the fourteenth amendment, the Court stated that the rule was a constitutional privilege and reasoned that no person should be convicted on unconstitutional evidence. *Id.* at 656-57. The Court further justified its application of the rule on the need to avoid a conflict between state and federal law produced when state courts admitted evidence that had been seized by federal officials in violation of the federal constitution. *Id.* at 657-58. The Supreme Court had already banned the use of evidence, seized by state officials in violation of the fourth amendment, in federal courts. *See* note 75 *supra* and accompanying text (discussing *Elkins'* rejection of "silver platter" doctrine). The Court also relied upon the "imperative of judicial integrity." *Id.* at 659 (citing Elkins v. United States, 364 U.S. 206, 222 (1960)). This rationale, however, could not justify application of the rule to the states through the due process clause of the fourteenth amendment. As long as they do not act unconstitutionally, state courts can presumably sully themselves with unlawfully-seized evidence without interference from a federal court.

80. 381 U.S. 618 (1965).

81. *Id.* at 621. Shortly after the Court's decision in *Mapp*, Linkletter, who had been convicted of burglary in Louisiana, sought habeas relief in both state and federal courts, arguing that he had been convicted on the basis of illegally-seized evidence. He appealed from the denial of his motion in district court, and the Fifth Circuit ruled that though his arrest and incident search were unconstitutional, the ruling in *Mapp* should apply only to convictions that had not become final prior to that decision. *Id.* The Supreme Court affirmed. *Id.* at 640. Justice Clark, who had authored *Mapp*, wrote for the Court:

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Id. at 629.

In his discussion of the purpose of the *Mapp* rule, Justice Clark said "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action." *Id.* at 636.

82. *Id.* at 637.

83. 392 U.S. 1 (1968).

84. *Id.* at 12. Although the Court acknowledged that the exclusionary rule's "major thrust is a deterrent one," *id.*, it went on to say that "the rule also serves another vital function—'the imperative of judicial integrity.' Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unchallenged governmental use of the fruits of such invasions." *Id.* at 12-13.

One year after *Terry*, the Court seemingly revitalized the principle that the exclusionary rule vindicates a personal right of the defendant when it reaffirmed its commitment to the fourth amendment standing doctrine[85] in *Alderman v. United States*.[86] Under this doctrine, a motion to suppress unconstitutionally seized evidence can be "successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."[87] This limitation on the range of defendants who can challenge unconstitutional police conduct by invoking the exclusionary rule makes sense only if the rule is conceived of as vindicating a personal right of the accused.[88] It is plainly inconsistent both with the notion that the rule's purpose is to prevent the government from profiting from its own wrongdoing,[89] and with the imperative of judicial integrity.[90]

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85. It is unclear whether "standing" continues as a threshold requirement to invoke the exclusionary rule. In Rakas v. Illinois, 439 U.S. 128 (1978), Justice Rehnquist noted that the question whether there has been a violation of the defendant's fourth amendment rights, which would activate application of the exclusionary rule to deter future violations, is the same question as whether the defendant has standing to make a motion to suppress. *Id.* at 140. Accordingly, the Court concluded that the "analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing." *Id.* In a 1980 case, United States v. Salvucci, 448 U.S. 83, 87 n.4 (1980), Justice Rehnquist confirmed that *Rakas* had abolished standing as a separate inquiry. *See also* Rawlings v. Kentucky, 448 U.S. 98, 104 (1980). He explained that he only used the term "standing" because the term was used in Jones v. United States, 362 U.S. 257 (1960), which the Court overruled in *Salvucci*. United States v. Salvucci, 448 U.S. at 87 n.4. In another 1980 case, United States v. Payner, 447 U.S. 727 (1980), however, Justice Powell still used the term "standing" to deny application of the exclusionary rule because the defendant's fourth amendment rights had not been violated. *Id.* at 731. Perhaps the explanation for this inconsistency is that the term "standing" will continue to be used as shorthand for whether the defendant can invoke the exclusionary rule, despite Justice Rehnquist's efforts to merge the inquiries into one.

86. 394 U.S. 165 (1969).

87. *Id.* at 171-72. The Court in *Alderman* rejected the argument that it should abolish the standing requirement to maximize deterrence because it was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime . . . on the basis of all the evidence which exposes the truth." *Id.* at 174-75.

One commentator has suggested that an improper ex parte communication from then Attorney General John Mitchell to certain justices may have influenced the Court's decision in *Alderman*. Burkhoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 ORE. L. REV. 151, 155 n.16 (1979) (citing E. WARREN, THE MEMOIRS OF EARL WARREN 337-42 (1977)).

88. *See id.* at 162 (*Alderman* reaffirmed general rule that fourth amendment rights are personal; thus, individuals whose own rights not violated have no right to claim exclusionary remedy). Professor Amsterdam has argued that the fourth amendment should be viewed as regulating governmental conduct and not primarily as protecting "atomistic spheres of interest of individual citizens." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974). The standing limitation implies an atomistic conception that is inconsistent with the regulatory conception presupposed by the deterrence rationale.

89. In recent years the Court has not paid much attention to the rationale advanced in earlier decisions, such as Silverthorne v. United States, 251 U.S. 385 (1920), that the government should not be permitted to profit from the wrongdoing of its agents. *Id.* at 392. When government agents obtain evidence against the defendant by violating the fourth amendment rights of third parties, the Court's refusal to relax standing limitations to allow the defendant to invoke the exclusionary rule has the effect of allowing the government to profit from its agents' wrongs. Even though the agents' conduct might have been illegal, the Court has upheld the government's use of the evidence to convict the defendants. Rawlings v. Kentucky, 448 U.S. 98, 109-10 (1980); United States v. Payner, 447 U.S. 727, 735 (1980); Rakas v. Illinois, 439 U.S. 128, 150 (1978).

90. If the Court would not exclude evidence on the facts of United States v. Payner, 447 U.S. 727 (1980), when the government actually advised its agents to violate the fourth amendment, *see* note 91

Moreover, it is also fundamentally at odds with the deterrence rationale. If only the victim of the search can invoke the exclusionary rule, the police will have every incentive to invade the privacy of third parties in the hope of obtaining evidence against the target of their investigation.[91] Nevertheless, the Court in *Alderman* rejected the argument that it should abolish the standing requirement in order to increase deterrence.[92] The Court explained that any incremental deterrence would be too marginal to justify the cost to the public of suppressing probative evidence.[93]

Five years after *Alderman*, whatever life remained in the principle that the exclusionary rule vindicates a personal right of the accused was abruptly extinguished by the Burger Court[94] in *United States v. Calandra*:[95] "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search

infra, it is hard to imagine that the Court would ever be provoked to utilize the "imperative of judicial integrity" as an independent basis for excluding unconstitutionally-seized evidence.

91. The recent case of *United States v. Payner* is illustrative. In *Payner*, the trial court made a finding of fact that the government "affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties," 447 U.S. at 730 (quoting United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977)). Under these circumstances, the application of the exclusionary rule would surely have had a deterrent effect on governmental practices calculated to obtain incriminating evidence by violating the fourth amendment. Nevertheless, even here the Court refused to relax the standing requirement. *Id.* at 735 (interest in deterring illegal searches does not justify exclusion of evidence at instance of party not victim of illegality); Alderman v. United States, 394 U.S. 165, 205-09 (1969) (Fortas, J., concurring in part and dissenting in part) (advocating doctrine of "target" standing). *See also* 3 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 11.3(h) (advocating standing for target of search); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 349-56 (1970) (same).

92. 394 U.S. at 174-75.

93. *Id.*

94. Even before he was elevated to the Supreme Court in 1969, Chief Justice Burger had been an outspoken critic of the exclusionary rule. *See* Smith v. United States, 324 F.2d 879, 881-82 (D.C. Cir. 1963) (per Burger, J.) (court admitted confessions made during illegal detention, refusing to make constitutional rules into "mere technical loopholes for the escape of the guilty") (quoting Stein v. New York, 346 U.S. 156, 196-97 (1952)); Wayne v. United States, 318 F.2d 205, 214 (D.C. Cir.) (per Burger, J.) (court upholds entry into apartment without warrant, rejecting notion of denying protection to society through "mechanical adherence to formalism"), *cert. denied*, 375 U.S. 860 (1963). *See generally* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964). Burger began his attack on the rule as Chief Justice in his dissenting opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). *See* notes 517-30 *infra* and accompanying text (discussing evolution of Chief Justice Burger's position on exclusionary rule).

In *Bivens*, Chief Justice Burger dismissed all but the deterrent rationale for the exclusionary rule, then argued that the rule's history had demonstrated that it was "both conceptually sterile and practically ineffective in accomplishing its stated objective." *Id.* at 415 (Burger, C.J., dissenting). Burger also sowed the seeds of a good faith exception in this dissent, arguing that because the purpose of the rule was deterrence, its application should be limited to willful and intentional fourth amendment violations, and should not apply when the police make "honest mistakes," and "errors of judgment" that "inevitably occur under the pressure of police work." *Id.* at 418.

Ironically, Burger was dissenting in *Bivens* from a decision by the Court that victims of unconstitutional searches and seizures have a private, civil right of action under the constitution itself against federal officials who violate their fourth amendment rights. Burger, who has consistently advocated that the exclusionary rule be replaced by an effective tort remedy, dissented because he felt that it was for Congress, not the courts, to fashion such a right of action. *Id.* at 411-12.

95. 414 U.S. 338 (1974). The Court held that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search because "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." *Id.* at 351. The Court distinguished *Silverthorne Lumber Co. v. United States* on tenuous grounds, noting that "the Court's broad dictum [in *Silverthorne*] has been substantially undermined in later cases." *Id.* at 352-53 n.8; *see* note 53 *supra* (discussing broad reach of exclusionary rule under *Silverthorne*).

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victim," the Court wrote.[96] "Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures."[97] The Court then recast the rationale of the standing doctrine to suit its own purposes, relying on *Alderman* to hold that the exclusionary rule would not bar the use of illegally-seized evidence by a grand jury:

> Despite its broad deterrent purpose, the exclusionary rule . . . as with any remedial device . . . has been restricted to those areas where its remedial objectives are thought most efficaciously served. . . . Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. . . . This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.[98]

The Court thus misread *Alderman*, and its analysis of the standing doctrine is sophistical; the standing limitation was not "premised" on concerns with deterrence, but rather on what was thought to be the personal nature of the right to invoke the exclusionary rule, the very right that the Court in *Calandra* explicitly rejected. In *Alderman*, the Court mentioned deterrence only in responding to the argument that the right to exclude evidence should extend to all defendants.[99]

Despite its questionable reasoning, *Calandra* has set an analytical pattern that the Court has essentially followed ever since. The Court has thus divorced the exclusionary rule from the fourth amendment itself, and has installed deterrence as the rule's preeminent purpose. While the Court occasionally mentions its duty to preserve judicial integrity, that responsibility now requires no more than refusing to admit illegally-seized evidence when to do otherwise would encourage police misconduct.[100] Consequently, the Court

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96. 414 U.S. at 347. The Court also rejected the witness' claim that questions by the grand jury based on private papers seized illegally from him constituted distinct, independent violations of his fourth amendment rights:

> Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally-obtained evidence are only a derivative use of the product of a past unlawful search or seizure. They work no new Fourth Amendment wrong.

Id. at 354.

97. *Id.*

98. *Id.* at 348.

99. 394 U.S. at 174-75. *See also* Jones v. United States, 362 U.S. 257 (1966), *overruled*, United States v. Salvucci, 448 U.S. 83 (1980), in which the standing doctrine is in no way limited to deterrence.

100. In United States v. Peltier, 422 U.S. 531 (1975), the Court noted that although previous decisions had "referred to 'the imperative of judicial integrity' . . . the Court has relied principally upon the deterrent purpose served by the exclusionary rule." *Id.* at 536 (citation omitted). Soon after *Peltier*, in Stone v. Powell, 428 U.S. 465 (1976), the Court stressed that the "imperative of judicial integrity" had played but a "limited role . . . in the determination whether to apply the rule in a particular context." *Id.* at 485. Nevertheless, it was in United States v. Janis, 428 U.S. 433 (1976), that the Court defined the judicial integrity rationale out of operative existence:

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presently decides both federal and state cases from the perspective of putative deterrent effect alone.

One problem is that this formula, balancing the marginal increment in deterrence that would be achieved by applying the exclusionary rule in a collateral setting against the putative costs to society,[101] appears to be skewed.[102] Because the Court begins its analysis skeptical that the actual deterrent effect of the exclusionary rule can even be measured,[103] all cases seem to come out in

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> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

Id. at 458 n.35.

This may sound harmless enough, but it is important to remember that in United States v. Calandra, 414 U.S. 338, 348 (1974), the Court had ruled that the accused has no personal constitutional right to have unlawfully-seized evidence excluded at trial. Therefore, because the Court "commits" no constitutional violation by admitting illegally-seized evidence, judicial integrity comes into play only when the Court "encourages" constitutional violations.

Although under the *Janis* analysis the "imperative of judicial integrity" is functionally coextensive with the deterrence rationale, and will not, it appears, have any operative significance, it is worthwhile to recognize that the *Janis* formulation appears to "constitutionalize" deterrence. There now seems to be a constitutional requirement to impose the exclusionary rule in contexts where the failure to do so would demonstrably encourage unconstitutional police conduct.

This "requirement" could be the basis for an attack on the constitutionality of the good faith exception. Such an argument would begin with the language of the fourth amendment: "[T]he *right of the people to be secure* . . . against unreasonable searches and seizures shall not be violated . . . ." U.S. CONST. amend. IV (emphasis added). The italicized words suggest that this is not simply an individual right to be free from unreasonable searches and seizures, but a right of the people of our society as a whole to enjoy a sense of confidence that their privacy will not be unnecessarily invaded by the government. This, in turn, imposes on all governmental institutions, and not just the police, the requirement that they act to ensure that the people can feel secure from unreasonable intrusions by government agents. As expressed in *Janis*, efforts to deter police misconduct are constitutionally mandated.

If we assume that the level of deterrence presently achieved by the exclusionary rule is constitutionally required, then inroads on the rule that would result in considerably more misconduct are unconstitutional unless other compensatory deterrent mechanisms are enacted. Such mechanisms are unlikely to come from legislatures, which "have not been, are not now, and are not likely to become sensitive to the concern of protecting [the privacy of] persons under investigation by the police. . . . [T]here will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control." Amsterdam, *supra* note 88, at 378-79. If this article is correct that a good faith exception will dilute the probable cause standard and stem the development of fourth amendment law, then such an exception diminishes the security to which each of us is entitled under the fourth amendment. Unless other measures will restore that level of security, the good faith exception is itself unconstitutional.

101. *See* notes 105-10 *infra* and accompanying text (discussing permissible uses of illegally-seized evidence).

102. Typically, the Court first suggests that the rule's impact on police conduct is uncertain even when its remedial objectives are thought to be most efficacious—in deterring police misconduct aimed at seizing evidence for the government's use in a criminal prosecution of the victim of the misconduct. Then, the Court reasons that even assuming the efficacy of barring this use of the evidence, the additional, marginal deterrent effect produced by forbidding the use of the evidence in some collateral way surely does not outweigh the cost to society in terms of law enforcement or the search for truth.

103. In *Elkins*, the Court recognized that "it is hardly likely that conclusive factual data could ever be assembled" that would demonstrate the deterrent effect of the exclusionary rule on police misconduct. Elkins v. United States, 364 U.S. 206, 218 (1960). Ever since *Elkins*, scholars have tried to measure the impact of the exclusionary rule on police misconduct, but the Court has viewed their results as "flawed." United States v. Janis, 428 U.S. 433, 450 & n.22 (1976).

Because of the "high price" to law enforcement extracted by the exclusionary rule, the Chief Justice has demanded that its proponents make a "clear demonstration" of its deterrent value. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). Nevertheless, as one commentator has charged, the Chief Justice's assignment of the "burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative.

favor of the government.[104] Unlawfully seized evidence is now admissible in grand jury proceedings,[105] to impeach the defendant's testimony at his criminal trial,[106] in civil proceedings to collect federal wagering taxes when the ille-

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The Chief Justice's assignment of the burden is merely a way of announcing a predetermined conclusion." Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332-33 (1973).

Many scholars have undertaken the challenge to study empirically the impact of the exclusionary rule. In 1970, Professor Oaks, in a widely cited article, concluded that the proponents of the rule had failed to demonstrate that it had any deterrent effect. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 678 (1970). He offered several imaginative—though in the end fruitless—suggestions for trying to measure empirically the rule's impact on police conduct. *Id.* at 732-34. Some of the early efforts to follow through on these suggestions have been discredited. For a devastating criticism, see Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974). Yet this research is still frequently cited as being authoritative. *See* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 225 n.4 (1978).

A survey of later studies leads to the conclusion that the impact of the exclusionary rule cannot be empirically measured. *Compare* Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398, 403 (1979) (existing data do not show whether exclusionary rule deters police misconduct) *with* Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is A Deterrent to Police?*, 62 JUDICATURE 404, 408 (1979) (proponents of rule have not met burden of proof that exclusionary rule is actually deterrent). *See also* Canon, *A Postscript on Empirical Studies and the Exclusionary Rule*, 62 JUDICATURE 455 (1979) (inferences can be drawn from data even though data not absolutely reliable); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974) (empirical data support inference that exclusionary rule is deterrent); Geller, *supra* note 70 (comprehensively surveying arguments for and against exclusionary rule, concluding that exclusionary rule does deter, but recommending that legislature also consider other deterrent mechanisms); Schlesinger, *A Reply to Professor Canon*, 62 JUDICATURE 457 (1979) (criticizing Canon's 1974 empirical study); Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & CRIMINOLOGY 373 (1974).

It is one thesis of this article that these efforts to measure the impact of the exclusionary rule have been largely misdirected because they rest on an unduly narrow conception of deterrence. Properly understood, the deterrent effect of the exclusionary rule is manifest. *See* text accompanying notes 161-200 *infra*.

104. This skepticism has not, however, led the Court to abandon the rule in its central application:

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions.

Stone v. Powell, 428 U.S. 465, 492-93 (1976).

105. United States v. Calandra, 414 U.S. 338, 349 (1974) (benefit of extending exclusionary rule to grand jury proceedings outweighed by potential injury to functions of grand jury). Professor LaFave argues that *Calandra* virtually distinguishes Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (grand jury may not subpoena documents when knowledge of their existence and contents derived from illegal search) "out of existence." 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 1.4; at 64; *see* United States v. Calandra, 414 U.S. at 352 n.8 (*Silverthorne* distinguishable from present case in significant respects and "certainly not controlling"). For an effective criticism of *Calandra*, see Critique, *supra* note 103.

106. United States v. Havens, 446 U.S. 620, 627-28 (1980) (government may impeach defendant's statements in cross-examination suggested by direct examination with illegally-obtained evidence that is inadmissible in direct case). The Court had previously ruled in Walder v. United States, 347 U.S. 62 (1954), that a defendant who perjured himself on direct examination could be impeached with evidence illegally seized from him in connection with an entirely different prosecution. *See id.* at 65 (defendant may not use suppressed evidence as shield to perjurious testimony). *Havens*, however, would allow impeachment of statements elicited on cross-examination with evidence seized in the instant case. It would, in effect, permit impeachment with illegally seized evidence virtually every time the defendant testifies. What the Burger Court did in *Havens* was much like what it had earlier done in Harris v. New

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gal search was conducted by state officials,[107] and in the trials of defendants who are the targets, though not the victims, of illegal searches carefully designed to circumvent application of the exclusionary rule.[108] Federal habeas corpus relief will be denied to a state prisoner if he had a "full and fair opportunity" to litigate his fourth amendment claim in a state criminal proceeding.[109] A new fourth amendment decision will not be applied retroactively, even to cases pending direct review at the time of the decision.[110]

Another problem with the Court's approach is that the cumulative effect of such exceptions may be great, even though the marginal loss of deterrence produced by the refusal to extend the exclusionary rule in a particular context may seem small. If, for example, the police unlawfully stop and search a car and its occupants, it is likely that some of the passengers would not have standing to challenge admission of unlawfully-seized evidence, or that the evidence will be admitted either to impeach the testimony of a defendant, or to secure an indictment in a grand jury proceeding. Although the police may not be thinking about any particular one of these permissible collateral uses of unlawfully-seized evidence, they may well go ahead with the unlawful search, confident that in one way or another it is likely to pay off.

By authorizing the use of unlawfully-seized evidence in collateral settings, the Court has so reduced the number of occasions in which the exclusionary rule might be applied that members of the Court[111] have predicted that the Court may abandon the rule altogether. So far, however, only Chief Justice Burger and Justice Rehnquist[112] have expressed a desire to eliminate the rule. During the last six years, in fact, a majority of the Court has applied the exclusionary rule as the means of compelling police respect for an enlarged range of protected interests.[113] The Court has not yet denied the application of the rule

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York, 401 U.S. 222, 225-26 (1971) (statements excluded because of *Miranda* violations may be used to impeach credibility of defendant's trial testimony). For a discussion and criticism of *Harris*, see Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). Ten years later, there is no longer reason to be anxious, just depressed.

107. United States v. Janis, 428 U.S. 433, 454 (1976) (societal costs of excluding evidence unlawfully seized by state officers in federal civil proceeding sufficiently outweigh deterrent effect on state police). *See generally* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 1.5, at 90-95 (discussing and criticizing *Janis*).

108. United States v. Payner, 447 U.S. 727, 731 (1980) (defendant may invoke exclusionary rule only when illegal conduct invaded his legitimate expectation of privacy, not that of third party); *see* note 91 *supra* (discussing *Payner*).

109. Stone v. Powell, 428 U.S. 465, 493-94 (1976) (contribution of federal review of state prisoners' search and seizure claims small in relation to costs). *Stone v. Powell* all but explicitly overruled Kaufman v. United States, 394 U.S. 217, 228 (1969) (vindication of prisoners' constitutional rights outweighs value of finality in criminal judgments).

110. United States v. Peltier, 422 U.S. 531, 538-39 (1975) (retroactive application of exclusionary rule does not further its deterrent purpose).

111. *See* United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., with Douglas & Marshall, JJ., dissenting) (expressing "uneasy feeling" that Court prepared to abandon exclusionary rule in search and seizure cases). *See also* note 32 *supra* and accompanying text.

112. *See* California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) (exclusionary rule should be overruled for both federal and state criminal trials); *cf.* Stone v. Powell, 428 U.S. 465, 500-01 (1976) (Burger, C.J., concurring) (overruling exclusionary rule would inspire alternative statutory remedy for violation of fourth amendment). *See also* note 32 *supra*.

113. The Court has ruled unconstitutional, and suppressed the fruits of: an arrest made without probable cause or a warrant, Brown v. Illinois, 422 U.S. 590, 601 (1975) (*Miranda* warnings neither remedy nor deter fourth amendment violations); random traffic stops, Delaware v. Prouse, 440 U.S. 648, 663 (1979) (privacy interference and fourth amendment violation to stop automobile without ar-

in a criminal prosecution in which the defendant was the victim of a violation of then-prevailing fourth amendment standards, regardless of whether the offending officer acted in good or bad faith.

Unlike the majority of the Supreme Court, the Fifth Circuit decided that it *does* make a difference whether the offending police officer was acting in good or bad faith.[114] When the appeals court adopted the good faith exception, it claimed that it was doing no more than the Supreme Court has already done—restricting the application of the exclusionary rule to those instances in which it will deter police misconduct.[115] In the Fifth Circuit's view, a police officer who acted in good faith when he violated the fourth amendment cannot be deterred because, by hypothesis, he did not know that what he was doing was unlawful.

Despite a superficial similarity to the analysis that the Supreme Court has developed to withhold application of the exclusionary rule when its deterrent effect would only be incremental, the Fifth Circuit in *Williams* actually misapplied the analysis. Although limiting the rule's application, as the Supreme Court has done, often gives the police a variety of incentives to ignore the commands of the fourth amendment, the *Williams* good faith exception would effectively preclude courts from even articulating those commands. Accordingly, *Williams* is a significant departure from the recent course of Supreme Court case law. It is one thing to deny application of the rule when it will achieve only marginal increments of deterrence; it is quite another to make an exception to the rule that will have the effect of discouraging general police compliance with the fourth amendment.

This article will show that the *Williams* good faith exception is inconsistent with the Fifth Circuit's professed fidelity to the goal of deterrence. Because one mistake of those who advocate the good faith exception flows from an misunderstanding of how the exclusionary rule works as a deterrent, this article will next discuss the deterrent function of the rule itself, and then the ways in which the good faith exception would cripple the rule's operation.

III. THE EXCLUSIONARY RULE AS A DETERRENT

A. THE QUANTUM OF DETERRENCE THE EXCLUSIONARY RULE MUST GENERATE

Although there exists a vast, if ultimately inconclusive, body of literature on the effectiveness of the exclusionary rule as a deterrent,[116] surprisingly little

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ticulable and reasonable suspicion); investigatory arrests for questioning, Dunaway v. New York, 442 U.S. 200, 216 (1979) (detention for custodial interrogation violates interests protected by fourth amendment); warrantless arrests in nonpublic places, Payton v. New York, 445 U.S. 573, 601 (1980) (warrantless entries into homes violates "overriding respect for the sanctity of the home"); warrantless searches of closed containers seized incident to arrest, United States v. Chadwick, 433 U.S. 1, 11 (1977) (sufficient privacy interests in personal effects placed inside double-locked footlocker to entitle defendant to protection of fourth amendment); and entries into the homes of third parties without a search warrant to effect an arrest, Steagald v. United States, 101 S. Ct. 1642, 1648 (1981) (arrest warrant does not entitle police to violate third party's privacy interest in his home).

114. United States v. Williams, 622 F.2d 830, 846-47 (5th Cir. 1980) (en banc) (second majority opinion) (adopting good faith exception to application of exclusionary rule), *cert. denied*, 449 U.S. 1127 (1981).

115. *Id.* at 847.

116. *See* note 103 *supra*. *See generally* Burger, *supra* note 94, at 11-12 (concluding that exclusionary

attention has been paid to the threshold issue of what amount of deterrence the rule must generate to justify itself. The question is obviously important; it is also complex. Nevertheless, at least a partial answer is available. The exclusionary rule is justified if suppressing evidence will result in at least the same pay-off in increased protection of privacy, for an equivalent cost in the conviction of wrongdoers, as does the probable cause requirement of the fourth amendment when the police adhere to it. The probable cause requirement reflects a trade-off between the same competing values that are in balance when the issue is whether to suppress evidence on account of a fourth amendment violation. The probable cause requirement compels society to pay a cost in the apprehension of criminals, or in the recovery of evidence of crime, for the sake of the people's privacy. It is surely legitimate for courts to suppress evidence if the lost evidence is counterbalanced by greater security for our "persons, houses, papers, and effects," to the same extent as when, at the same cost, the police comply with the mandate of the fourth amendment not to seize or search without probable cause.[117]

The probable cause requirement is the fundamental test for the constitutionality of most searches or seizures.[118] Before an officer can make an arrest, he

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rule has no substantial deterrent effect); Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1145-58 (1959) (suggesting data on deterrence inconclusive); O. Fiss, *supra* note 103, at 672-709, 720-57 (concluding that exclusionary rule without demonstrable direct deterrent effect but best existing device for enforcing fourth amendment); Paulsen, *Law and Police Practice: Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 74-76 (1957) (concluding that exclusionary rule most effective remedy because provides incentive to police departments to educate officers and disassociates courts from systematically illegal behavior).

117. Thus, the legitimacy of the exclusionary rule can be established if it can be shown that the balance of its benefits against its costs is no worse than the balance inherent in the probable cause requirement. The converse, however, does not necessarily follow. It may be that the exclusionary rule is constitutionally legitimate or even constitutionally compelled although the probable cause requirement is more cost-effective. It is possible that some alternative justification can sustain the exclusionary rule, even as a purely prophylactic device, despite its costliness in comparison with the probable cause standard. This article does not pursue that point.

118. In almost every situation, a police officer must have probable cause before searching or seizing. *See* Dunaway v. New York, 442 U.S. 200, 210, 216 (1979) (probable cause required to seize suspect and to transport him to headquarters for interrogation). Some types of detentions and searches, however, are inherently less intrusive than others. If a police officer lacks probable cause but has reasonable articulable suspicion that a person is committing or has committed a crime, the officer may approach the suspect, identify himself, and question the suspect briefly. If, furthermore, the officer has an articulable reason to suspect that the person may be armed and dangerous, he may conduct a limited patdown of the suspect's outer clothing for weapons. Terry v. Ohio, 392 U.S. 1, 30 (1968). The police may conduct searches and seizures in a small class of additional cases on a lesser standard than probable cause if their conduct is deemed relatively unintrusive and the law enforcement need is deemed great. *See, e.g.*, Michigan v. Summers, 101 S. Ct. 2587, 2595 (1981) (probable cause not required for police to detain occupant during valid warrant search of house for contraband); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam) (probable cause not required for police to order driver out of lawfully-stopped car); Adams v. Williams, 407 U.S. 143, 147-48 (1972) (less than probable cause sufficient for police to perform limited search of driver sitting in car parked in high crime area late at night when officer had tip that driver armed).

Other searches that are permitted without probable cause are, for the most part, the so-called administrative or regulatory searches. These include searches of businesses to enforce health and safety regulations, border searches, and airport searches. *See* Donovan v. Dewey, 101 S. Ct. 2534, 2541-42 (1981) (statute authorizing warrantless inspections of mines and stone quarries does not violate fourth amendment); United States v. Ramsey, 431 U.S. 606, 617 (1977) (border searches not subject to warrant provisions of fourth amendment and do not require probable cause); United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973) (pre-boarding screening of passengers and carry-on luggage at airport gate does not violate fourth amendment even though conducted without warrant). These searches have been upheld primarily because they occur as part of a highly visible, regulatory or administrative scheme of general

must have probable cause to believe that the suspect committed a crime.[119] Likewise, before he may conduct a search or seize property, an officer must have probable cause to believe that his efforts will yield either contraband or the fruits, instrumentalities, or evidence of a crime.[120]

Both the exclusionary rule as a deterrent and the probable cause requirement are regulatory. Each aims to control law enforcement behavior, the probable cause requirement through a mandate to law enforcement officers and reviewing magistrates, and the exclusionary rule through a mandate to trial courts. Further, they both strike a balance between the legitimate needs of law enforcement and the right of the citizen to be free from unreasonable governmental intrusion.[121] Although the Supreme Court has never precisely defined probable cause,[122] its meaning is surely very close to "more likely than

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application, so that there is little likelihood that the searches will be conducted in an arbitrary or discriminatory manner. When courts have concluded that the regulatory scheme left too much discretion to those administering it, they have struck down the statutes and suggested guidelines to ensure impartial application. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (random stop of automobiles for license and registration check constitutes unreasonable search under fourth amendment; Court suggests that questioning of all drivers at fixed stop might be permissible); Marshall v. Barlow's, Inc., 436 U.S. 307, 324 (1978) (warrantless inspections under Occupational Safety and Health Act violate fourth amendment; reasonableness of other warrantless administrative searches will depend upon specific enforcement needs and privacy guarantees of particular statute); See v. City of Seattle, 387 U.S. 541, 545-46 (1967) (administrative search of portion of commercial premises not open to public permissible only through warrant procedure; licensing programs requiring inspections will be examined on case-by-case basis in future).

Moreover, no stigma attaches to the targets of these searches. The individuals subject to them are members of morally neutral classes, not of traditionally disfavored economic or racial subgroups who are likely to be, or at least perceive themselves to be, singled out for unfair treatment and whose privacy government officials may be prone to undervalue. Finally, individuals may be able to avoid regulatory searches by altering their conduct, and often are forewarned as to when and where the searches will occur.

119. Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (probable cause required for arrest). In Beck v. Ohio, 379 U.S. 89 (1964), the Supreme Court explained the test for the validity of an arrest as:

> [W]hether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Id. at 91.

120. *See* Warden v. Hayden, 387 U.S. 294, 309-10 (1967) (if probable cause exists, police may search for evidence as well as fruits, instrumentalities, and contraband).

121. *See* Brinegar v. United States, 338 U.S. 160, 176 (1949) (probable cause standard provides balance between desire to prevent unreasonable invasions of privacy and attempt to give flexibility to law enforcement).

122. The Supreme Court has suggested that probable cause does not exist unless the information at hand singles out a particular individual. *See* Wong Sun v. United States, 371 U.S. 471, 483-85 (1963) (no probable cause to arrest when agent could not know whether defendant was in fact person described by informant); Johnson v. United States, 333 U.S. 10, 16 (1948) (no probable cause for arrest when police officers did not know identity or number of occupants of room from which they detected odor of opium). *See generally* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 45, § 3.2(e), at 477-79.

The Model Code of Pre Arraignment Procedure (Proposed Official Draft, 1975) would permit investigative arrests on the less stringent standard of "reasonable cause." *Id.* at 14. The Code draftsmen contend that this standard is not foreclosed by present law, citing several state court decisions and one decision from a United States Court of Appeals. *Id.* at 294.

In Dunaway v. New York, 442 U.S. 200 (1979), however, the Supreme Court pulled the rug out from under this recommendation. In *Dunaway*, the Court held that probable cause is required for an investigatory arrest, *id.* at 214, and emphasized that the standard for probable cause is stringent:

> . The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised [by al-

not."[123] Speaking generally, the police may arrest a person who more likely than not has committed, or is committing, an offense. Similarly, they may search if more likely than not they will find the incriminating evidence they seek. Thus, in either of these situations, the police must reasonably believe that the likelihood that they will obtain their goal—by bringing a guilty person to book or by recovering evidence of his offense—is greater than fifty percent. Over a period of time, therefore, the fourth amendment tolerates the arrest or search of x number of innocent people if, correspondingly, there are $x + 1$ arrests of the guilty or searches that pay off. To state the formula the other way, for y number of fruitful police invasions of people's privacy, there must be no more than $y - 1$ fruitless invasions.[124] Otherwise, the police are searching and seizing when their suspicions do not rise to the level of probable cause.

The analogy between the probable cause standard and the exclusionary rule is most striking when we consider how the probable cause mandate operates to forbid a search or seizure. Under that standard, the police must forbear when the likelihood that their suspicions will prove justified is merely fifty percent or less. Thus, the fourth amendment requires that, over time, society tolerate z number of guilty persons escaping arrest or avoiding a search that would have uncovered evidence of their delicts, if, correspondingly, there are z or more innocent persons who thereby escape an unnecessary police intrusion.[125] Pre-

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lowing an exception to the requirement for investigatory arrests]. "The requirement of probable cause has roots that are deep in our history." Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest."

Id. at 213 (quoting Henry v. United States, 361 U.S. 98, 100 (1959)). The Court then went on to reject a proposed "multifactor balancing test," *id.* at 213, which would require the police, and then the reviewing court, to weigh "the manner and intensity of the interference, the gravity of the issue involved and the circumstances attending the encounter," in judging the lawfulness of an arrest for further investigation. *Id.* at 211 n.14.

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases . . . . A single, familiar standard is essential to guide police officers, who have neither the time nor the expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

Id. at 213-24 (footnote omitted).

123. In *Brinegar v. United States*, the Supreme Court noted that: "Probable cause exists 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). Such a belief would not be warranted if the facts available to the officer made it as likely as not that the officer was wrong.

124. This section has drawn a correspondence between fruitful and fruitless searches and seizures, rather than between legal and illegal police conduct because that is the correspondence that the probable cause standard itself suggests. The suppression of evidence of one fruitful but illegal search is justified if one fruitless search is thereby prevented. A somewhat more complicated question is how many future illegal searches (fruitful and fruitless alike) must be deterred in order to justify suppression. As the point seems largely irrelevant to this discussion, it has not been pursued.

125. This discussion assumes for the sake of simplicity that a person who secretes evidence of a crime is in fact guilty of an offense. The police may, however, invade a person's privacy, no matter how innocent he is, if they have sufficient grounds to believe that the search will yield evidence. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978) (critical element of reasonable search not that owner of property suspected of crime, but rather that police have reasonable cause to believe that evidence located on owner's property).

cisely the same values are in conflict when the decision is whether illegally-seized evidence should be suppressed. Society's right to apprehend and convict the guilty is pitted against the people's right to be secure against governmental intrusion. The exclusionary rule is amply justified, then, if its operation replicates the results of the probable cause requirement: that is, if the suppression of the fruits of one illegal search or seizure leads to the avoidance of a single fruitless police intrusion in the future.[126]

The warrant requirement of the fourth amendment provides further support for adopting the probable cause standard as the proper measure for justifying the exclusionary rule. Although the argument for the suppression of evidence for a violation of the warrant requirement is more attenuated than for a direct violation of the probable cause requirement,[127] both the warrant requirement and the exclusionary rule have the same overarching purpose: protection against searches and seizures conducted without probable cause. The procedural requirements of the warrant clause implement the probable cause standard. The warrant requirement allows a magistrate to assess independently the presence of probable cause before the policeman acts.[128] Similarly, the particularity requirement of the warrant clause seeks to ensure that the officer will search only those areas, and seize only those items, with respect to which the magistrate has found probable cause.[129] Suppression motivates the police to comply with the warrant requirement in the future, thereby increasing reliance on warrants and reducing the likelihood that an officer will arrest or search without probable cause.[130]

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126. Although for the sake of convenience the argument above is in terms of the discrete quantum of deterrence that might flow from a single suppression order in a particular criminal prosecution, the question should usually be considered in a broader context. Our concern is ultimately with a viable system of suppression. A single suppression order in a single case may have little or no discernible effect on future police conduct; yet consistent application of the exclusionary rule by a reasonable and resolute judiciary could significantly alter police behavior.

127. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted). Because suppression of evidence for a violation of the warrant requirement does not depend upon the probability of a successful search or seizure, application of the exclusionary rule when there has been a violation of the warrant requirement does not directly replicate the balance that the probable cause standard establishes. Nevertheless, because the warrant requirement implements the probable cause standard, it is possible to measure the deterrent effect of suppressing evidence for warrant clause violations in the same manner as for violations of the probable cause requirement.

128. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297, 317 (1972) (review by neutral magistrate mandatory); Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) (State Attorney General may not issue warrant); Mancusi v. DeForte, 392 U.S. 364, 371 (1968) (use of subpoena *duces tecum* as search warrant improper because circumvents requirement of review by magistrate); Johnson v. United States, 333 U.S. 10, 14 (1948) ("neutral and detached magistrate" better judge of probable cause than "officer engaged in the often competitive enterprise of ferreting out crime").

129. *See* Andresen v. Maryland, 427 U.S. 463, 480-82 (1976) (fourth amendment prohibits general warrants; valid search warrant limited to evidence of suspected crime); Berger v. New York, 338 U.S. 41, 59-60 (1967) (wiretap statute failed particularity requirement when it only required names and addresses of persons whose conversations were to be audited).

130. Application of the exclusionary rule to violations of the warrant requirement does not impose greater costs than application of the rule to searches and seizures made without probable cause. If an officer is unable to obtain a warrant in time to conduct a search, the absence of the warrant is likely to be excused under the "exigent circumstances" doctrine, and the evidence admitted. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit of suspect justifies warrantless entry); Schmerber v. California, 384 U.S. 757, 770 (1966) (officers' reasonable belief that evidence would be destroyed justified withdrawing blood for alcohol test from unconscious accident victim); McDonald v. United States,

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Despite the similarities between the probable cause requirement and the exclusionary rule, the disparate amount of public attention that their effects receive constitutes one important difference. The costs of the exclusionary rule are immediately apparent; its benefits are only conjectural. When courts apply the rule, they deprive law enforcement officers of incriminating evidence. In contrast, any police misconduct that would have occurred but for the deterrent effect of the suppression order is purely speculative. On the other hand, when the police do not search because they believe they lack probable cause, the public is not aware that potential evidence is lost. Further, in the unlikely event that the public becomes aware of a decision not to search, the benefits are apparent. An individual's privacy remains intact while the cost is merely conjectural: it cannot be known if evidence was in fact lost. Th[us] although the cost of adhering to the requirements of the fourth amendment a[nd] the cost of applying the exclusionary rule are similar, the exclusionary rule "rubs our noses in it."[131]

B. TYPES OF DETERRENCE

As the preceding section has demonstrated, the probable cause standard suggests a threshold level of deterrence that would justify the continued existence of the exclusionary rule. In order to determine whether the rule does adequately prevent police misconduct, this article considers three distinct types of deterrence. Professor Oaks identifies the first two types: "special deterrence," which describes the effect on the particular officer who violated the fourth amendment and has had evidence suppressed, and "general deterrence," the name for the rule's restraining influence on other officers.[132] There is yet a third form of deterrence, "systemic deterrence," that Professor Oaks overlooks. This article uses the term systemic deterrence to describe the rule's effect on individual police officers through a police department's institutional compliance with judicially articulated fourth amendment standards. As developed below, this process is most visible when the police must respond to changes in

335 U.S. 451, 454-55 (1948) (imminent danger to innocent party, threat of destruction of evidence, and possible flight by suspect justify warrantless search and seizure); Johnson v. United States, 333 U.S. 10, 15 (1948) (same). If courts without hesitation suppressed evidence for all purposes whenever an officer improperly proceeded without a warrant, the rational police officer, erring on the side of caution if uncertain of whether a warrant was necessary, would always obtain a warrant when required and practicable. He would have nothing to lose by complying with the warrant requirement, and nothing to gain from disobeying.

The exclusionary rule as a result would be extremely cost-effective. At virtually no cost, it would achieve nearly complete compliance with the warrant requirement. Any exceptions to the exclusionary rule that might tempt an officer to dispense with a warrant would not only impair the right of the people to be secure from unjustified searches and seizures, but also result in unnecessary loss of evidence. Thus if an officer hoped that, despite his failure to obtain a warrant, the evidence might nevertheless be useful against a defendant without standing, *see* United States v. Salvucci, 448 U.S. 83, 85 (1980), as impeachment evidence, *see* United States v. Havens, 446 U.S. 620, 627-28 (1980), or in the prosecution's case-in-chief if the officer acted in good faith, *see* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) (second majority opinion), *cert. denied*, 449 U.S. 1127 (1981), he would be more likely to ignore the warrant requirement. Yet, if officers are led to miscalculate, the public suffers a double loss. Its privacy is less secure, and criminals benefit from the suppression of probative evidence.

131. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974).

132. Oaks, *supra* note 103, at 709.

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134. Oaks, *supra* note 103

135. *Id.*

136. *Id.* at 710.

137. *Id.* at 731 n.193.

138. J. HIRSCHEL, FOURTH [AMENDMENT]
district attorneys, and defens[e]
statements relating to the det[ection]
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exclusion of illegally seized [evidence]
many kinds of searches they [would]
The statement: "An important [thing]
looking for will be admissible [evidence]
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Though Hirschel contends th[at]
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fourth amendment law.[133] Further, the rule prevents violations of fourth amendment standards by facilitating the articulation of the standards themselves. The exclusionary rule works systematically through these means to make privacy rights more secure.

Special Deterrence. Oaks defines "special" deterrence as the prevention of future misconduct by one particular officer through the imposition of an individual sanction.[134] In Oaks' analysis, the exclusionary rule does not even attempt to perform this function because it does not impose any direct punishment.[135] Oaks doubts that the disappointment an officer experiences when a court suppresses evidence will motivate him to change his ways in the absence of any formal departmental action.[136] Yet elsewhere in his article, when he describes what he learned one summer as an Assistant State's Attorney in Chicago, he relates that after the prosecutor lost a motion, he "found a significant fraction of patrolmen who were leaving the courtroom confused and bitter about the action taken, attributing it to the venality of the judges or prosecutor (or both), and having no idea whatever of how to modify their own conduct to avoid a repetition."[137] Whatever else his observations may show, Oaks has described police officers who care that evidence has been lost and who presumably would want to avoid this result in the future. Further, an empirical study of police officers' responses to questionnaires revealed that a significant number of officers felt "a personal loss" when a court suppressed evidence they had seized.[138] Thus, it is reasonable to conclude that the threat of the exclu-

133. Although Oaks discusses only special and general deterrence, "systemic" deterrence is somewhat different. The effect of systemic deterrence is self-evident as police departments continue to issue directives to their officers. Its success rests on the assumption that police officers follow department orders. Police department responses include issuance of direct orders, dissemination of fourth amendment decisions, training both new and experienced officers, and formation of policy on police conduct in search and seizure situations. *See* notes 162-74 *infra* and accompanying text (discussing department reactions to Delaware v. Prouse, 440 U.S. 648 (1979)).

134. Oaks, *supra* note 103, at 709.

135. *Id.*

136. *Id.* at 710.

137. *Id.* at 731 n.193.

138. J. HIRSCHEL, FOURTH AMENDMENT RIGHTS 86-87 (1979). Hirschel requested police officers, district attorneys, and defense attorneys to register their agreement scaled from zero to 100 to several statements relating to the deterrent effect of the exclusionary rule. A score of 100 would indicate total agreement. The police overall mean in response to the statement, "A police officer feels a personal loss when evidence he has seized is excluded in a court" was 58.8. *Id.* In response to the statement, "The exclusion of illegally seized evidence in court proceedings discourages police officers from making many kinds of searches they would otherwise make," the police overall mean was 65.5. *Id.* at 84-85. The statement, "An important factor in a police officer's decision to search is whether the article he is looking for will be admissible as evidence in court" elicited a police overall mean response of 56.9. *Id.* at 85.

Though Hirschel contends that his study reveals that the exclusionary rule is an ineffective deterrent, his data seem to belie his conclusion. Officers in his study were asked whether they would search in certain hypothetical situations. But it is simply impossible to determine to what extent a police officer views his personal views of what searches and seizures are reasonable to the operation of the exclusionary rule and resulting court decisions giving content to the fourth amendment. Thus, even though the officers in Hirschel's studies tended to a broader view of what was reasonable than the view that the courts in fact held (each of Hirschel's questions derived from a published appellate court decision), the officers' views might nonetheless reflect the influence of the courts. Most importantly, the police apparently share the view that a search is reasonable only if it is likely to uncover evidence and that an arrest is reasonable only if the person arrested is probably guilty. In other words, they accept the probable cause standard as the test of reasonableness. There is, of course, no inherent reason why this should be

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sionary sanction does influence individual police officers.

General Deterrence. The exclusionary rule not only deters the police officer who has had evidence suppressed from further unlawful searches, but also deters law enforcement officers who are aware of the rule yet have not personally experienced the loss of evidence. Oaks describes this effect as general deterrence and divides it into two subcategories: "direct," with immediate effects, and "indirect," entailing long term results.[139]

Direct deterrence, in Oaks' analysis, requires effective communication between the police department and police officers to be successful.[140] Other considerations important to the effectiveness of direct deterrence include an officer's understanding of fourth amendment law, his fear of suppression, and the importance to him of not violating the fourth amendment.[141] The direct deterrent effect of the exclusionary rule depends upon an individual officer's perception of the relative costs of conformity and nonconformity with the rule.[142] Indirect deterrence, on the other hand, depends upon the extent to which police officers' values reflect fourth amendment standards.[143] A threat of punishment helps to develop patterns of conforming behavior that influence an officer's conduct even after he has ceased to weigh the pros and cons of observance in an individual case.[144] Further, Oaks contends that the exclusionary rule provides a police officer with an argument to justify his own compliance with fourth amendment standards, when his fellow officers do not regard such compliance as desirable in its own right.[145]

Operation of Special and General Deterrence. In Oaks' view, the exclusionary rule does not achieve very much deterrence through either of these mechanisms because the requisites for effective deterrence are lacking.[146] Specifically, Oaks contends that: (1) suppression affects only police behavior aimed at successful prosecution,[147] (2) police officers as a group do not share a system of values that emphasizes protection of constitutional rights,[148] and (3) the exclusionary rule attempts to enforce a poorly-communicated and confusingly-articulated set of standards.[149]

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so. Certainly, societies exist where the police can search, arrest, or demand documentary evidence of identification on the slightest suspicion or even at will. That the police in our society perceive "reasonableness" as they do may well be a function of court decisions and the operation of the exclusionary rule. Thus, although there is naturally a gap between the views of the courts and the views of the police, the width of the gap might be fairly constant. Police perception of reasonableness will shadow court rulings as long as the courts continue to interpret and enforce the fourth amendment by suppressing evidence obtained in violation of its standards. For a discussion of this neglected, educative function of the law, see F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 77-83 (1973).

139. Oaks, *supra* note 103, at 710-12.
140. *Id.* at 710.
141. *Id.* at 710-11.
142. *Id.* at 710.
143. *Id.* at 711.
144. *Id.*
145. *Id.* at 712.
146. *Id.* at 720.
147. *Id.* at 720-25.
148. *Id.* at 727-29.
149. *Id.* at 730-32. Oaks also suggests other limitations upon the effectiveness of the exclusionary

Oaks' first criticism, that the exclusionary rule may not deter police conduct aimed at goals other than conviction, is beside the point. The only sensible measure of the deterrent value of the rule is the number of illegal searches and seizures it prevents, not the number that occur despite it. The fallacious argument that the rule is a failure because it cannot deter some kinds of illegal searches often recurs in discussions of deterrence. In their study of deterrence, Zimring and Hawkins dub it the fallacy of "The Warden's Survey."[150] They cite the works of several celebrated prison wardens to show how the warden's perspective can skew his perception of the deterrent effect of the criminal law.[151] A warden of Sing Sing, for example, wrote that "the prison man knows this threat [the death penalty] is no deterrent for convicts have told him so again and again."[152] As Zimring and Hawkins explain, the fallacy of this inference is that the warden "has based his conclusion on experience with groups of men who have evidently *not* been deterred or they would not be in prison."[153] His experience provides scant information about how many others the threat of capital punishment has deterred. The warden has simply never met them. Whatever one's view of the death penalty, all sanctions for murder should not be repealed simply because some people have killed in spite of those sanctions. Similarly, the exclusionary rule should not be abolished merely because some police officers violate the fourth amendment in spite of it. If the rule cannot influence certain types of police behavior, the answer is to devise additional controls, not to abolish the one significant control that already exists.

Professor Amsterdam suggests that the exclusionary rule is analogous to police department anti-theft programs for branding personal property.[154] Identification marks diminish the value of property to a prospective thief because he knows that it will be more difficult to sell the goods at a worthwhile price.[155] Thus, such programs reduce the incentive to steal. Although thieves who steal only for excitement, for their own use, or for revenge, are not deterred by identification programs, police departments should not, for this reason alone, abandon these programs. The assertion that the exclusionary rule fails to deter a police officer whose conduct is motivated by other than the hope for successful prosecution is a similarly unconvincing argument for abandoning the exclusionary rule.

Oaks' second argument, that police values may conflict with constitutional values,[156] is more troublesome. This tension, however, would frustrate *any*

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[150] First, police officers have little fear of disciplinary action by the department. Second, the penalty for exclusionary rule falls not upon them, but upon the prosecutor. *Id.* at 725-26. Third, motivation to comply with the fourth amendment varies widely among different officers in particular situations. *Id.* at 729-33.

[151] F. ZIMRING & G. HAWKINS, *supra* note 138, at 30-32.

[152] *Id.* at 26-31 (citing C. DUFFY, 88 MEN AND 2 WOMEN (1962); L. LAWES, MEET THE MURDERER (1940); Kirchwey, *The Prison's Place in the Penal System*, 157 ANNALS OF AAPSS 13 (1931)).

[153] *Id.* at 31 (citing DUFFY, *supra* note 151, at 22).

[154] *Id.*

[155] Amsterdam, *supra* note 88, at 431.

[156] "On the other hand," as Amsterdam puts it, "a criminal court system functioning without an exclusionary rule . . . is the equivalent of a government purchasing agent paying premium prices for goods branded with the stamp of unconstitutionality." *Id.* at 431-32.

[157] Oaks, *supra* note 103, at 727-29.

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remedy designed to conform police conduct to constitutional standards. Yet there is evidence that the problem is, at least in part, generational. Younger officers may be more willing to accept the legitimacy of constitutional restraints in solving crimes and apprehending offenders.[157]

Oaks' third criticism, that police officers do not understand fourth amendment standards because those standards are poorly-communicated and confusingly-articulated,[158] is likewise vexing. Nevertheless, this failure of communication is a difficulty that must be overcome if police are ever to comply with constitutional standards, whatever enforcement mechanism courts may employ.[159] Thus, the lack of understanding is a problem attendant to the fourth amendment itself, not to the exclusionary rule.[160] If poor communica-

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157. *See* S. WASBY, SMALL TOWN POLICE AND THE SUPREME COURT 105, 218 (1976) (study of police in rural communities indicated "generational effect" in reactions to exclusionary rule). *See also* Amici Curiae Brief for Americans for Effective Law Enforcement, Inc. at 17, California v. Krivda, 409 U.S. 33 (1972) (arguing that exclusionary sanction no longer constitutionally required because police professionalism in search and seizure area has eliminated bulk of fourth amendment violations).

158. Oaks, *supra* note 103, at 730-32.

159. The problem of unclear standards is likely overstated. In certain areas where the law remains unsettled—notably the "container" search cases—standards are confusing. Nevertheless, the basic standards for the great majority of searches and seizures are far more definite. The fundamental principle that the police may not conduct a search or seizure without probable cause is easy enough to understand, and the courts have perfromed generally well in giving the police guidance whether probable cause is present in recurring fact patterns. *See* notes 185-93 *infra* and accompanying text. Further, situations where the police may search or seize without probable cause are about as clearly defined as one could realistically hope. *See* note 118 *supra*.

Reading reported appellate cases yields skewed perceptions of the difficulties police encounter when trying to comply with the fourth amendment, because reported cases are likely to be the very ones where the propriety of police action is doubtful, but the action is not clearly wrong. The vast bulk of police searches and seizures are never recounted in the case reports. Moreover, in the area where confusion is presently greatest, the container search cases, the issue is whether the police may search without a warrant. Even if the bounds of the warrant requirement are hazy in those cases, the police can easily obtain the evidence they seek and comply with the fourth amendment by simply obtaining warrants in doubtful cases.

160. This is, for example, the argument in Dworkin, *supra* note 103. Dworkin, himself a supporter of the exclusionary rule, *id.* at 330-33, nonetheless asserts that "the law does not permit the rule to work as well as possible." *Id.* at 333. In his view, "[f]ourth amendment law is so uncertain, incomprehensible, quibble ridden, and ever changing that it deprives any sanction of a meaningful chance to control conduct." *Id.* at 333-34. The underlying disease generating these symptoms is, Dworkin believes, the "fact style decision making," *id.* at 334, by which the Court too often resolves fourth amendment issues. *Id.* at 334. Dworkin advocates regulating the police through inflexible enforcement of rules "expressed in language directed to the police and clear and precise enough for them to follow." *Id.* at 336. This solution, Dworkin argues, would obviate the need for determining the applicability of a rule on a case-by-case basis. *Id.* Dworkin's criticisms, whatever their merit, are not criticisms of the exclusionary rule.

At the end of its most recent term, the Supreme Court decided two fourth amendment cases that suggest that the Court may be moving toward a more rule-oriented conception of the amendment. In New York v. Belton, 101 S. Ct. 2860 (1981), the majority, in an opinion by Justice Stewart, announced the bright-line rule that when police lawfully arrest the occupant of a car, they may search the entire passenger compartment and any open or closed containers found within. *Id.* at 2864 & n.4. The opinion purported to be only an extension of Chimel v. California, 395 U.S. 752 (1969). 101 S. Ct. at 2864. Writing for the majority in *Chimel*, Justice Stewart had limited the scope of a search incident to a valid arrest to the area within the arrestee's immediate control, in which he could obtain a weapon or destroy evidence. 395 U.S. at 763. The Court in *Chimel*, however, had established only a general rule for application on a case-by-case basis.

In Robbins v. California, 101 S. Ct. 2841 (1981), decided the same day as *Belton*, Justice Stewart again endeavored to establish a hard and fast rule. *Id.* at 2847. In *Robbins*, the police seized two bricks of marijuana wrapped in opaque plastic in the luggage compartment during a valid automobile search. The court held the search invalid and the marijuana inadmissible. Police must obtain a warrant to search opaque containers found in the luggage compartment during a lawful search of a car. *Id.* In

tion is a reason to abolish the exclusionary rule, then it would similarly be a reason to abolish any device for enforcing the fourth amendment. Moreover, it would be craven for us to abolish the exclusionary rule on grounds of ineffectiveness when the police themselves hold the key to rendering it effective through better hiring practices, training, and continuing instruction.

Systemic Deterrence. Although Oaks' criticisms of the exclusionary rule as a deterrent can be individually countered, the major flaw underlying his entire argument is his reliance on the analogy between the deterrent effect of criminal law and the deterrent effect of the exclusionary rule. This analogy fails under close analysis, because the exclusionary rule operates through mechanisms that simply have no analog in the penal law. Unlike the criminal law, which seeks to control the behavior of the general public, the exclusionary rule attempts to influence the conduct of members of various law enforcement agencies. Although there are many such agencies, each is a structured governmental entity. It is likely that the threat of the exclusionary sanction will influence these various police units and through them, the individual officers. Consequently, even if a particular constable is indifferent to whether his arrests and seizures result in convictions, those who run the police department are concerned with successful prosecutions. Further, although individual officers might entertain hostility toward fourth amendment rights, police departments are not likely to share such a view, at least officially. Thus, at least the more professional police forces can be expected to encourage fourth amendment compliance through training and such guidelines as the department provides for conducting searches, seizures, and arrests.

Moreover, even if the standards that the fourth amendment sets are more elusive than the rules embodied in the general criminal law, police officers are in an excellent position to assimilate them. The fourth amendment, after all, permeates the officers' day-to-day professional life, and police departments surely possess the means to convey information to the officers in the field. Even if prosecutors cannot always find the time to explain the fourth amendment to the police, many of the larger police departments hire legal counsel to make legal standards intelligible to the policeman on patrol.[161]

An example of systemic deterrence is the administrative response to the Supreme Court's decision in *Delaware v. Prouse*.[162] In *Prouse*, the Court ruled that police may not stop a car on the open road for a license or registration check, in the absence of articulable suspicion to believe that criminal activity is afoot.[163] Before *Prouse*, the constitutionality of random traffic stops was un-

Justice Stewart wrote only for a plurality. Justice Powell concurred in the judgment but rejected the plurality's bright-line rule in favor of a test of whether a sufficient expectation of privacy in the items searched exists. 101 S. Ct. at 2847 & n.1 (Powell, J., concurring). Regardless of the wisdom of the opinions in *Belton* and *Robbins*, these cases demonstrate the Court's increased sensitivity to the need for more manageable standards. *But see* United States v. Ross, 655 F.2d 1159 (D.C. Cir.) (en banc) court of appeals held that police required to obtain warrant to search paper bag in automobile trunk. Supreme Court agreed to hear argument on question whether *Robbins v. California* should be reconsidered), *cert. granted*, 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981) (No. 80-2209).

161. *See* notes 162-74 *infra* and accompanying text (discussing police department reactions to fourth amendment decisions).

162. 440 U.S. 648 (1979).

163. *Id.* at 663.

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certain.[164] In the District of Columbia, for example, police had conducted such stops upon the strength of a 1972 decision of the District of Columbia Court of Appeals.[165] Nevertheless, when in 1979 the Supreme Court in *Prouse* announced that these stops violated the fourth amendment,[166] the D.C. Metropolitan Police reacted swiftly. The Chief of Police issued an immediate telex message to his officers, advising them to desist from the practice.[167] The Police Department is now incorporating the change in procedures in the Department's General Orders, a set of regulations issued to each officer and with which each officer must be familiar.[168]

Even before the ultimate Supreme Court decision in *Prouse*, the Delaware State Police had responded to the trial court's holding that random traffic stops were unconstitutional.[169] After the trial court's decision the State Attorney General's office conferred with a Legal Officer employed by the Delaware State Police.[170] Within two months of the court's decision, the Legal Officer had disseminated a memorandum to all troops and units within the State Police describing the decision, explaining the conduct it prohibited, and advising that it did not affect stops based on articulable suspicion.[171] The memorandum also provided several examples of facts that could provide sufficient articulable suspicion for a stop.[172] The Legal Liaison Office of the Delaware State Police has noted that "[a]ll court decisions affecting daily police operations are disseminated to patrol officers by similar Legal Memorandums."[173]

While this article has not undertaken to survey other police department responses to *Prouse*, or other court decisions changing or clarifying the scope of permissible police conduct,[174] it is apparent what police departments, or at least the larger of them, can do. It denigrates the professionalism of the police

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164. *See id.* at 651 & nn.2-3 (listing conflicting decisions on issue of random stops in state and federal courts of appeals).

165. Palmore v. United States, 290 A.2d 573, 583 (D.C. 1972), *aff'd on jurisdictional grounds*, 411 U.S. 389 (1973).

166. 440 U.S. at 663.

167. *See* Wash. Post, March 28, 1979, § A, at 1, col. 4 (discussing D.C. Police Chief Jefferson's prompt orders to officers to stop performing random traffic stops without articulable suspicion).

168. *See* M.P.D.C. Gen. Order 304-10 (1973). This general order, which deals with a broad range of police-citizen contacts, is currently being updated to take into account recent changes in the law. Telephone conversation between Silas Wasserstrom and Vernon Gill, General Counsel, Metropolitan Police Department (Nov. 12, 1981). The general order's provisions on traffic stops have already been rescinded by a special order. *Id.*

169. State v. Prouse, No. 176-12-0213 (Del. Super. Ct. Mar. 10, 1977) (per Walsh, J.) (unreported) (copy on file at *Georgetown Law Journal*), *aff'd*, 382 A.2d 1359 (Del. 1978), *aff'd*, 440 U.S. 648 (1979).

170. Memorandum from James E. Liguori, Deputy Attorney General of the State of Delaware to Lieutenant Thomas J. Roman (Mar. 31, 1977) (copy on file at *Georgetown Law Journal*).

171. Legal Memorandum, No. 2-77, from Lieutenant Thomas J. Roman, Legal Officer, Delaware State Police (May 2, 1977) (copy on file at *Georgetown Law Journal*).

172. *Id.*

173. Letter from Captain Thomas J. Roman to Scott Mendelloff (July 17, 1981) (copy on file at *Georgetown Law Journal*). Captain Roman kindly gave us this information in answer to our inquiry concerning the response of the Delaware police to *Prouse*, and he provided us with copies of the documents cited in notes 170-71 *supra*.

174. Another case in point that can be readily documented is the response to Almeida-Sanchez v. United States, 413 U.S. 266 (1973). After the Court's decision in that case, Border Patrol agents altered their practices to conform with it. United States v. Brignoni-Ponce, 422 U.S. 873, 880 n.6 (1975). In *Almeida-Sanchez*, the Court held that probable cause is necessary for random, full-car searches near the Mexican border. 413 U.S. at 273. *But see* United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (no suspicion required for police to stop and question occupants of car at reasonably located

to assume that they cannot or will not assimilate the standards that the courts set. It is reasonable to assume that a professional police department can obtain substantial compliance from its officers in the field, especially when, as in *Prouse*, a new decision announces a relatively clear-cut rule.[175]

The suppression of evidence in *Prouse*, therefore, was a small price to pay for an enormous benefit in protection from unlawful police activity. At the cost of one marijuana prosecution, the Delaware State Police, and, it can be expected, police everywhere who had previously conducted routine license and registration spot checks, have abandoned this practice. No doubt countless motorists have been, and will be, spared this violation of their constitutional rights. Thus, applying the measure of the deterrent effect of the exclusionary rule that the probable cause requirement suggests—that suppression of evidence in one case must prevent police misconduct in one or more instances—the exclusionary rule performs admirably. Applying the rule not only deters the specific officer who lost evidence from repeating his transgression, but the specter of the rule also deters officers who have not personally lost evidence. Even more dramatically, the rule prevents countless abridgements of fourth amendment rights through law enforcement's institutional response to changes in fourth amendment law.

C. PREVENTION OF VIOLATIONS THROUGH DEVELOPMENT OF FOURTH AMENDMENT LAW

As *Prouse* demonstrates, the exclusionary rule affects police department conduct and achieves at least systemic deterrence. An equally important, although less obvious, benefit of the rule is that it fuels the development of fourth amendment law. A glance through any criminal procedure case book

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border checkpoints); United States v. Brignoni-Ponce, 422 U.S. at 881-82 (articulable suspicion sufficient for Border Patrol agent to stop car near Mexican border and to conduct limited questioning).

Although similar examples of changes in institutional policy resulting from court decisions on the fourth amendment abound, the literature concerning empirical evidence on the effectiveness of the exclusionary rule largely ignores them. Assuming that field officers obey administrative directives concerning proper search and seizure procedures (and they surely do to some significant degree), cases such as *Prouse* and *Almeida-Sanchez* clearly demonstrate that suppression of evidence in one case can prevent subsequent fourth amendment violations. This is, manifestly, a form of deterrence.

175. Fourth amendment decisions result in changes in the behavior of law enforcement officials not only at state and local levels, but also at the federal level. In an address to the Harlan Fiske Stone Law Society at Amherst College, FBI Director William Webster described the FBI's present methods of apprising its agents of all Supreme Court and relevant court of appeals fourth amendment decisions. Webster, *Routine Methods Won't Stop the Leaders of Crime*, AMHERST, Summer 1981, at 27. Webster stated that "[w]ithin 24 hours after a major case comes down affecting our right to do anything, the people in the field are informed of the significance of that case, with more details to follow." *Id.* An example of this action was the FBI's response to decisions on the authority of the agency to enter premises surreptitiously to install a microphone. The United States Court of Appeals for the Sixth Circuit held that, although the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518 (1976), permitted the FBI to seek a court order to enter, it did not authorize a surreptitious break-in even with such an order. United States v. Finazzo, 583 F.2d 837, 841 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979). The FBI promptly informed its agents within the jurisdiction of the Sixth Circuit of the decision in *Finazzo*, and instructed them to stop conducting surreptitious entries. Webster, *supra*, at 27. The Supreme Court later decided that such entries were legal. *See* Dalia v. United States, 441 U.S. 238, 248, 254 (1979) (fourth amendment does not prohibit per se, and title III implicitly permits, courts to authorize covert entries to install electronic surveillance devices). The FBI again sent instructions to its agents. Although the Court held that the statute did not require a court order for surreptitious entry, the FBI still demanded that its agents seek court authorization. Webster, *supra*, at 27.

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should persuade even the skeptic that virtually every case defining fourth amendment limits on police behavior arose only because a defendant objected to the use of certain evidence, forcing a court to decide whether the police had violated the defendant's constitutional rights when they obtained it.[176] Think, for example, of *Chimel v. California*,[177] *United States v. Katz*,[178] *Payton v. New York*,[179] and *Steagald v. United States*.[180] All of these cases involved objections to the use of evidence and all resulted in new limits on intrusive police conduct.[181] Thus, exclusionary rule litigation provides the principal occasion for the articulation of fourth amendment standards.[182] Without such litigation, it is likely that many of these fourth amendment issues would have remained unresolved.

The exclusionary rule not only prevents fourth amendment violations by eliciting path-breaking decisions by the Supreme Court, but also is indispensible to the development of law by the lower courts. Suppression litigation provides the principal occasion for appellate courts to clarify and refashion the broad principles of the fourth amendment; it also permits development of coherent standards through case-by-case adjudication of more fact-specific questions. This process is most evident in the cases that give content to the phrase "probable cause." Given both the myriad factual situations that the police encounter and the often unpredictable variations within even common pat-

176. *E.g.*, Y. KAMISAR, W. LA FAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE CASES, COMMENTS AND QUESTIONS (5th ed. 1980); S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE CASES AND COMMENTARY (1980); L. WEINREB, LEADING CONSTITUTIONAL CASES ON CRIMINAL JUSTICE (1981).

177. 395 U.S. 752 (1969).

178. 389 U.S. 347 (1967). It is important to recognize that exclusionary rule litigation not only provides the occasion for developing fourth amendment standards of reasonableness, but also the occasion for deciding what sorts of governmental intrusions and surveillance consitute a search or seizure, and are thus subject to constitutional restraints and judicial scrutiny. As technological advances result in ever more "frightening paraphanalia which the marvels of an electronic age . . . visit upon human society," Silverman v. United States, 365 U.S. 505, 509 (1961), what privacy we have is increasingly threatened. Continuing exclusionary rule litigation that defines a "search" thus becomes all the more essential to the protection of that privacy. As Professor Amsterdam puts it, "I can think of few constitutional issues more important than defining the reach of the fourth amendment--the extent to which it controls the array of activities of the police. . . . the amount of power that it permits its police to use without effective control by law." Amsterdam, *supra* note 88, at 377.

179. 445 U.S. 573 (1980).

180. 101 S. Ct. 1642 (1981).

181. Steagald v. United States, 101 S. Ct. at 1645 (defendant moved to suppress unlawfully-seized evidence); Payton v. New York, 445 U.S. at 577 (same); Chimel v. California, 395 U.S. at 754 (defendant objected to admission into evidence of unlawfully-seized property); United States v. Katz, 389 U.S. at 348 (defendant objected to use of unlawfully-intercepted phone conversations).

182. The case law abounds with examples of the developmental benefit of the exclusionary rule. In Chimel v. California, 395 U.S. 752 (1969), for example, the Court held that a warrantless search incident to a valid arrest may extend only to the area within the suspect's immediate control. *Id.* at 763. In so holding, the Court overruled United States v. Rabinowitz, 339 U.S. 56, 59, 64 (1950) (one hour search of defendant's office, including desk, safe, and files, justified as incident to valid arrest). 395 U.S. at 768. Similarly, the Court in United States v. Katz, 389 U.S. 347 (1967), held that the use of an electronic eavesdropping device attached to the outside of a phone booth constituted an unreasonable search under the fourth amendment. *Id.* at 354. The *Katz* Court refused to follow the holding of Olmstead v. United States, 277 U.S. 438 (1928), that the fourth amendment applies to eavesdropping only when an actual physical invasion has occurred. 389 U.S. at 353. Finally, it was only after the exclusionary rule was applied to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961), that the Court had occasion to address the issue of just how much of the fourth amendment applied to state officials through the fourteenth amendment. In Ker v. California, 374 U.S. 23, 33 (1963), the Court ruled that it applied in full.

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terns, reducing probable cause to a set formula is an impossible task.[183] Nevertheless, by deciding fourth amendment cases, courts are able to define probable cause more precisely. Thus, through this continual refinement, the police can become more certain of when probable cause exists and when it is lacking.

Fourth amendment case law in the District of Columbia provides one example of the developmental benefits of the exclusionary rule. When a police officer observes a suspected drug deal, he confronts a recurring dilemma. When he sees an interchange between people on a sidewalk, particularly in a high drug-use area of the city, he is justifiably suspicious. Yet he may not actually see any identifiable substance change hands. Moreover, the brief detention and interrogation that *Terry v. Ohio*[184] permits in these circumstances is unlikely to yield anything but denials. Unless the officer can act, however, the sale of drugs may continue with impunity. Thus, although the case law recognizes the significance of other factors such as the particular officer's expertise in recognizing narcotics transactions,[185] the suspect's reaction to an approaching officer,[186] and the reputation of the area as one in which narcotics are prevalent,[187] the District of Columbia Court of Appeals has developed a practical test. Generally, if the officer sees a suspect pass something in return for money under otherwise suspicious circumstances, he may arrest.[188] If he sees only a one-way transfer, however, he may not.[189]

Another recurring close question of probable cause arises when a police officer sees someone carrying property down the street, but has no knowledge of a particular theft to which the property can be linked. In this situation, the case law holds that the officer may not seize the property or arrest the person even if *Terry* questioning elicits evasive responses.[190] Appellate decisions do,

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183. The authors do not share Dworkin's dismay that the Supreme Court has been unable to condense all of probable cause into a few easily stated and applied rules. *See* Dworkin, *supra* note 103, at 329, 367. Probable cause issues arise in so many different settings and involve so many potential variations that any comprehensive set of rules would be too rigid to encompass all the relevant considerations.

184. 392 U.S. 1 (1968); *see* note 118 *supra* and accompanying text (discussing police conduct that is permissible on less than probable cause).

185. *See* Munn v. United States, 283 A.2d 28, 30 (D.C. 1971) (narcotics agent's experience with drug transactions relevant to finding of probable cause to arrest); *cf.* Bell v. United States, 254 F.2d 82, 85-86 (D.C. Cir.) (officer's experience relevant to finding probable cause to arrest), *cert. denied*, 358 U.S. 885 (1958).

186. *See* Tobias v. United States, 375 A.2d 491, 494 (D.C. 1977) (flight of suspect upon approach of officer relevant to assessment of probable cause).

187. *See* Peterkin v. United States, 281 A.2d 567, 568 & n.4 (D.C. 1971) (frequency of drug traffic in particular area may be relevant to assessment of probable cause), *cert. denied*, 406 U.S. 922 (1972).

188. *See id.* at 568-69 (transfer of substance in bottle in return for cash in high drug activity area provided probable cause to arrest).

189. *See* Vicks v. United States, 310 A.2d 247, 249 (D.C. 1973) (transfer of money without two-way exchange insufficient grounds for probable cause to arrest); Gray v. United States, 292 A.2d 153, 155-56 (D.C. 1972) (mere transfer of money not ground for probable cause).

The Metropolitan Police Department's General Counsel's Office transmits teletype messages for dissemination to all officers that summarize and analyze decisions such as these as soon as they are reprinted. *See* Teletype Message No. 31-428 (Oct. 26, 1981) (describing probable cause test established by District of Columbia Court of Appeals in Howell v. United States, 109 Daily Wash. L. Rep. 2049 (D.C. Aug. 4, 1981)) (copy on file at *Georgetown Law Journal*). The teletype message is read at roll call for the week after it is issued. *Id.*

190. *See* United States v. Pannell, 383 A.2d 1078, 1079-80 (D.C. 1978) (no probable cause to arrest or seize property even when *Terry* questioning of suspect carrying television on street heightens officer's

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however, tell the police what additional information provides probable cause justifying a search or arrest. Courts have upheld arrests and seizures when the police saw the defendant appear to look for something to steal before he reappeared carrying the suspect property,[191] when the property bore distinctive markings of ownership obviously placed there by someone other than the suspect and the suspect ran when the officer approached,[192] and when the policeman offered a detailed description of the suspicious conduct he observed before arresting the suspect and the suspect obviously lied in answering the officer's questions.[193]

These appellate decisions provide valuable guidance to police concerning when they may or may not act. Although the opinions may fall short of providing fool-proof formulas, they do draw sensible lines that the police can be expected to understand and observe, if they are motivated to do so. Thus, these standards themselves prevent violations of fourth amendment rights, for they give the police a reasonably clear message of when, despite their suspicions, the law does not permit arrest. Such specific standards develop only through case-by-case adjudication of fourth amendment issues.

By functioning as the primary mechanism through which the courts develop and articulate the limits of the fourth amendment itself, the exclusionary rule plays an indispensible role in preventing fourth amendment violations.[194] Although this point appears obvious, critics and courts have generally overlooked this benefit of the rule when balancing its advantages against its costs.[195] Yet clarifying what the police may and may not do can result in enor-

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suspicions); Campbell v. United States, 273 A.2d 252, 253, 255 (D.C. 1971) (no probable cause to arrest if suspect carrying television and screwdriver, even when denies ownership of screwdriver during brief questioning); Dougherty v. United States, 272 A.2d 675, 676 (D.C. 1971) (no probable cause to copy serial and model numbers of television suspect carrying on street).

191. *See* Nixon v. United States, 402 A.2d 816, 818-19 (D.C. 1979) (probable cause to arrest when suspect looked intently into parked cars in high crime area, reappeared later carrying box concealed in newspaper, and replied suspiciously to brief questioning).

192. *See* Edwards v. United States, 379 A.2d 976, 977-78 (D.C. 1977) (probable cause to arrest when suspect carrying property in pillow case with mark of school in deserted area late at night and fled when officers approached and identified themselves).

193. *See* Wray v. United States, 315 A.2d 843, 845 (D.C. 1974) (probable cause to arrest when detailed report of suspicious conduct observed by officer and suspect obviously lied during *Terry* questioning).

194. The exclusionary rule contributes to the development of fourth amendment law not only in situations involving arrests and searches made without probable cause, but also in the context of warrants. If an officer knows that both the issuing magistrate and a trial judge at a suppression hearing might scrutinize his affidavit, he will likely be more careful in ascertaining and stating his grounds for probable cause before he acts. The exclusionary rule also discourages the magistrate-shopping that might occur if there were no possibility of examination of an affidavit in support of a warrant at a later hearing. Further, the magistrate is likely to take more care in determining the existence of probable cause if the possibility of later scrutiny exists. Finally, a challenge to the magistrate's finding of probable cause aids in the development of fourth amendment law, particularly as certain constitutional issues, such as requirements for informants, arise most commonly when the police act with warrants. Admittedly, the law that the Supreme Court has fashioned in this area is not as coherent as it might be. *See, e.g.*, United States v. Harris, 403 U.S. 573, 581 (1971) (plurality opinion) (affidavit in support of warrant sufficient when it relates unnamed informant's personal observations and prior events within affiant's own knowledge); Spinelli v. United States, 393 U.S. 410, 416 (1969) (affidavit in support of warrant must indicate underlying circumstances showing informant's reliability and either how informant gathered information or detail sufficient to indicate information more than mere rumor); Aguilar v. Texas, 378 U.S. 108, 120 (1964) (affidavit must indicate basis for believing informant reliable). *See generally* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.3.

195. Professor Oaks recognizes that "[i]t is . . . imperative to have a procedure by which courts can

mous benefits in protecting privacy.[196] Moreover, this process of judicial clarification can advance even when a court upholds police conduct. In *Dorman v. United States*,[197] for example, the United States Court of Appeals for the District of Columbia Circuit spelled out in detail the considerations that indicate the presence or absence of exigent circumstances sufficient to justify a warrantless entry of a house to make an arrest.[198] In this influential case,[199] the court defined exigent circumstances, although ultimately ruling that the evidence obtained was admissible.[200] Thus, important guidelines can emerge even when a

review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review . . . ." Oaks, *supra* note 103, at 756. Yet when Oaks listed the means by which the rule might prevent fourth amendment violations, he considered only its deterrent effect in a literal sense, rather than its more broadly conceived preventive value. *Id.* at 709-19.

Similarly, the Supreme Court overlooked the interest in fourth amendment law development when it denied habeas corpus relief to convicts who had a full and fair hearing on fourth amendment claims in state court. Stone v. Powell, 428 U.S. 465, 482 (1976). The Court reasoned that the possibility of collateral review of an alleged fourth amendment violation would have little or no deterrent effect. *Id.* at 493. Balancing this assumed miniscule or nonexistent incremental deterrence against the costs of allowing collateral application of the exclusionary rule, the Court denied habeas corpus review. *Id.* at 494. The Court, however, failed to consider whether collateral review of fourth amendment claims was justifiable because such review contributes to the development of fourth amendment law.

Cover and Aleinikoff argue that federal habeas corpus review permits a useful dialogue between federal and state courts, each of which brings a different perspective to criminal law issues. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036, 1050 (1977). Given the different nature of prosecutions in each, state and federal courts are likely to develop different perspectives on crime, law enforcement, and the fourth amendment generally. Thus, federal habeas corpus review of state prisoners' fourth amendment claims is probably necessary to allow state and federal courts to apply their own strengths to common problems. In considering whether to limit federal habeas corpus review, the Supreme Court should have addressed this point.

To the authors' knowledge, the Supreme Court has never discussed this process of law development through the exclusionary rule. Justice Brennan, however, alluded to it in his dissent in United States v. Peltier, 442 U.S. 531, 554 (1975) (Brennan, J., with Marshall, J., dissenting) (Court's refusal to apply Almeida-Sanchez v. United States, 413 U.S. 266 (1973), retroactively "could stop dead in its tracks judicial development of Fourth Amendment rights"). *See generally* Geller, *supra* note 70, at 654-56 (discussing opportunity for judicial review provided by exclusionary rule).

196. Certainly, a trial court's suppression of evidence often results in no written opinion and no appeal. Such cases, however, generally involve flagrantly unlawful police conduct. In such cases, an opinion is not necessary to tell the police what they have done wrong. Here the exclusionary sanction works more like a penal sanction. When a court applies the exclusionary rule to such flagrant misconduct, each individual instance of suppression functions primarily through special deterrence. At the same time, the constant suppression of such evidence serves as a general deterrent by removing from the police an incentive to violate the law. Moreover, when flagrant misconduct is involved, the normative principle underlying the rule—that the government should play no part in unlawful activity—is a compelling justification for the exclusionary sanction.

197. 435 F.2d 385 (D.C. Cir. 1970) (en banc).

198. *Id.* at 392-93. The court listed the following seven considerations: (1) whether the suspected offense is especially violent; (2) whether the police have a reasonable belief that the suspect is armed; (3) whether there are more grounds for probable cause than the minimum necessary to obtain a warrant; (4) whether the officers have a strong reason to believe the suspect is on the premises; (5) whether the suspect is likely to escape unless promptly apprehended; (6) whether the entry is peaceable; and (7) whether entry is during the day or night. *Id.*

Similarly, courts have developed limits for administrative searches while determining the admissibility of evidence in a criminal case. *See* Michigan v. Tyler, 436 U.S. 499, 510 (1978) (no warrant required to enter burning premises and remain for reasonable time to investigate, additional entries necessitate compliance with warrant requirements for administrative searches).

199. *See, e.g.*, United States v. Acevedo, 627 F.2d 68, 70 (7th Cir. 1980) (utilizing *Dorman* criteria for determining presence of exigent circumstances sufficient to justify warrantless entry); United States v. Kuleaar, 586 F.2d 1283, 1287 (8th Cir. 1978) (same); United States v. Campbell, 581 F.2d 22, 26 (2d Cir. 1978) (same).

200. 435 F.2d at 392-93.

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court declines to suppress evidence.

Empirical studies that seek to rebut the efficacy of the rule as a deterrent often emphasize the substantial number of constitutional violations, as measured by successful motions to suppress, that occur despite the threat of the exclusionary sanction.[201] This measure, however, is fundamentally flawed. An increase in the number of successful motions to suppress is consistent with development of fourth amendment law. It may simply reflect an increased willingness of the defense bar to challenge doubtful, but longstanding, police practices like those in *Prouse*. Thus, more successful motions to suppress may be filed at the same time that the number of unreasonable searches or seizures decreases. Moreover, as courts tighten constitutional restraints on police, more constitutional violations will be recognized as such, even though police will generally heed new fourth amendment law. Just as no problem of black unemployment existed until slavery was abolished, so no fourth amendment violations existed until the courts gave meaning to the amendment in the course of litigation spawned by the exclusionary rule.[202]

D. THE ALTERNATIVE OF A TORT REMEDY

While an effective tort remedy would be a much needed supplement to the exclusionary rule,[203] such a remedy, even if it could be implemented,[204] would be an inadequate substitute.[205] This is because the exclusionary rule is essential to the development of fourth amendment law. Fourth amendment violations simply generate little litigation not related to suppression of evidence. *Delaware v. Prouse*[206] again provides a valuable example of this. Without the exclusionary rule, it is improbable that the Court would have determined that random traffic stops constitute unreasonable seizures within the fourth amend-

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201. *See* note 116 *supra* (studies of effectiveness of exclusionary rule).

202. So also does the measure of per capita income within a country go down as its infant mortality rate is reduced.

203. The exclusionary rule has the obvious drawback that it only provides a remedy for fourth amendment violations that result in the seizure of incriminating evidence. A tort remedy is therefore needed as a supplement to the exclusionary rule.

204. The possibility that legislatures will develop such a remedy is remote. As Professor Amsterdam has noted:

> Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police. Even if our growing crime rate and its attendant mounting hysteria should level off, there will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control.

Amsterdam, *supra* note 88, at 378-79.

205. Professor Dellinger has argued that the unqualified language of the fourth amendment—that "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated"—prohibits government from "buy[ing] itself out of having to comply with the constitutional commands" simply by paying to do so through tort damages. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972). This is a powerful argument in favor of the exclusionary rule when there has been a knowing and intentional violation of fourth amendment rights. When government agents have acted unconstitutionally but in good faith, however, the government is less clearly buying itself out of compliance with constitutional restraints when it pays tort damages. Nevertheless, as this article argues, in all other respects tort damages are peculiarly inappropriate, and the exclusionary rule peculiarly necessary, when good faith, close to the line, police misconduct is involved.

206. 440 U.S. 648 (1979).

ment. Despite this important developmental role, critics of the exclusionary rule have suggested the alternative of a tort remedy.[207] Yet providing the victim of an illegal search or seizure with redress in a separate civil action would not serve the purpose of developing fourth amendment law.[208]

A stop on the highway may be inconvenient, and even humiliating, and standardless stops can easily become capricious or discriminatory. But, once the stop is over, most people would continue on their way, because the per-

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207. One danger of unchecked police investigatory activity is the likelihood that searches and seizures will be conducted in an arbitrary and discriminatory manner. By requiring that police have reason to single out a particular individual or premesis before they arrest or search, the probable cause and warrant requirements abate this danger. Some commentators have persuasively argued that an additional mechanism for minimizing the dangers of arbitrary police conduct would be to require that intrusive police action be undertaken pursuant to comprehensive departmental regulations. *See* Amsterdam, *supra* note 88, at 417-23, 436-38 (suggesting such regulation as additional requirement of fourth amendment); Kaplan, *supra* note 131, at 1050 (suggesting that exclusionary rule not apply where "the police department in question has taken seriously its responsibility to adhere to the fourth amendment" by educating and regulating its officers). *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. (1967).

208. In his dissent in Wolf v. Colorado, 338 U.S. 25 (1949), Justice Murphy addressed the issue of alternatives to the exclusionary rule, discussing both criminal and civil actions against police officers who have violated a person's fourth amendment rights. *Id.* at 41 (Murphy, J., with Rutledge, J., dissenting). Justice Murphy emphasized some considerations that make a tort action an inadequate remedy: the difficulty of obtaining punitive damages, the variations in state rules limiting damages, the admissibility of the plaintiff's reputation, the common requirement of physical harm, the difficulties in collecting from often "judgment-proof" officers, and the possibility that the use of evidence seized in a criminal trial may be a defense in a tort suit. *Id.* at 43-44.

There are additional difficulties with a tort remedy not mentioned by Justice Murphy, including the fear of reprisal for suits against the police and the likelihood of jury prejudice in favor of officers. *See* Geller, *supra* note 70, at 692 (suggesting that fear of reprisals prevents civil suits against police); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1388-89 (1981) (claimant must run risk of reprisals from police and prosecutor; in addition, juries historically sympathize with police). *See also* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). On the other hand, there have been some significant changes in the law since Justice Murphy wrote, which enhance the possibility of recovering against governmental entities for the torts of their employees. In 1974, for example, the Federal Tort Claims Act (FTCA) was amended to permit actions against the federal government arising out of a federal officer's assault, battery, false imprisonment, abuse of process, or malicious prosecution. Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (amending 28 U.S.C. § 2680(h) (1970)). *See generally*, Note, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 GEO. L.J. 803 (1981). In addition, many state statutes are available to persons seeking redress against state officers for constitutional violations. *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 450 n.13 (1978) (citing statutes); Schroeder, *supra*, at 1386-87. The Supreme Court has also opened paths for recovery against officers who violate the Constitution. In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Court held that a municipality may be liable under 42 U.S.C. § 1983 (1976 & Supp. III 1979) for the torts of its employees. 436 U.S. at 690. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court ruled that municipalities may not assert the good faith of their officers as a defense to a section 1983 claim. *Id.* at 650-51, 655-56.

Nevertheless, many obstacles block the plaintiff's path to recovery of tort damages. It has been held, for example, that under the FTCA an individual agent, as well as the government, may utilize a defense of "good faith and reasonable belief in the legality of . . . [the agent's] conduct." Norton v. United States, 581 F.2d 390, 397 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978); *cf.* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972) (valid defense in *Bivens* action against federal officer that agent acted in good faith with reasonable belief in validity of arrest and search), *on remand from* 403 U.S. 388 (1971). Furthermore, in order to recover against a municipality under section 1983, a plaintiff must demonstrate that the constitutional infringement was the result of governmental policy or custom, not merely the misdeed of an individual officer. Monell v. Department of Social Services, 436 U.S. at 694. Thus, even though there now exist potentially more effective tort remedies for egregious police misconduct, these remedies are inherently unsatisfactory alternatives to the exclusionary rule as a mechanism for developing fourth amendment law.

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sonal inconvenience and intrusion are slight. Thus, damages in most tort actions would be only nominal. Therefore, although random traffic stops exact a high cumulative societal cost, and consequently demand fourth amendment protection, it is unlikely that a victim would have challenged the procedure in a tort action.[209] Many other privacy interests that demand fourth amendment protection fall in the same class.

Further, the probability of recovering damages in a tort action is minimal when, as in *Prouse*, the conduct of the police did not clearly violate a previously articulated legal standard. If a police officer's conduct is not manifestly unlawful, he could probably shield himself from tort liability by asserting some form of good faith defense.[210] Under *Pierson v. Ray*,[211] a good faith defense is available to state officers in federal civil actions brought under 42 U.S.C. § 1983;[212] such a defense is almost certainly available to federal officers in federal actions under the fourth amendment itself.[213] Thus, even if a tort remedy were effective when police conduct is flagrantly unlawful, that remedy would be useless to those challenging police conduct that had not previously been held unlawful.[214]

In such situations, a tort remedy would be not only unavailable but also undesirable. Critics of the exclusionary rule who would replace it with sanctions aimed directly at the offending officer often miss the point that if such sanctions were viable, they would deal a far more crippling blow to law enforcement than does the mere exclusion of illegally-seized evidence.

Under the probable cause standard police should operate close to the limits of behavior permitted by the fourth amendment. When probable cause is absent, police may not, and should not, arrest or search. When probable cause exists, however, they not only may act,[215] but generally should search or ar-

209. A contingent-fee lawyer would be unlikely to represent a client whose constitutional rights had been violated in such a situation because of the unpredictability of damages. Moreover, it is doubtful that the same client would be willing to assume possibly high legal fees in order to bring an action.

210. A good faith defense does exist in civil actions against officials pursuant to 42 U.S.C. § 1983 (1976). By examining the application of this defense, one author attempted to predict the effects of a good faith exception to the exclusionary rule in criminal proceedings. Hoopes, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 916 (1978). Hoopes concluded that a good faith exception could adequately protect a defendant's fourth amendment rights if problems of burdens of proof and the standard for determining what actions are indeed in good faith were resolved. *Id.* at 951. Hoopes suggested, however, that application of the civil good faith defense results in an emphasis on the officer's interpretation of the facts and that a similar result in a criminal proceeding would be "inconsistent" with the overriding policy of the fourth amendment that the determination of the propriety of a search and seizure is ideally removed from the discretion of the officer." *Id.*

211. 386 U.S. 547 (1967).

212. *Id.* at 557; *see* note 210 *supra*.

213. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that although Congress had provided no tort remedy for a violation of the fourth amendment, such a violation gave rise to a cause of action for money damages. *Id.* at 397. On remand, the United States Court of Appeals for the Second Circuit held that proof of good faith was a defense to such an action. 456 F.2d 1339, 1348 (2d Cir. 1972).

214. This would also be true when a suit is brought against a governmental entity. *See* note 208 *supra*.

215. Occasionally an arrest or search on probable cause is nevertheless held to be unreasonable. For example, in Filer v. Smith, 96 Mich. 347, 55 N.W. 999 (1893), the Supreme Court of Michigan allowed a claim for false arrest, stating that the police had a duty to collect additional facts when further investigation could quickly and easily increase or dispel probable cause. *Id.* at 354-55, 55 N.W. at 1002; *see* 1

rest.[216] Under the threat of sanctions imposed directly on the individual officer, however, officers may forbear from acting, even when they think they have the right, for fear that those who review their actions will disagree. This additional deterrence at the margin is an unnecessary social cost.

Thus, not only is civil litigation for damages often impractical, it is also an undesirable device for articulating and clarifying fourth amendment rights. If civil litigation were a victim's only recourse, the spot check issue in *Prouse*, for example, would almost certainly remain unresolved. Because William Prouse challenged this practice, albeit for the selfish motive of avoiding a conviction for drug possession, society has benefitted; the decision in *Prouse* has likely averted countless invasions of constitutional rights on our highways.[217] In contrast to civil remedies, the exclusionary rule exacts a peculiarly appropriate price for conduct that exceeds constitutional limits: it deprives the government of the precise evidence that would have been unavailable had its agents respected those limits.[218] Further, it provides police departments with an in-

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LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.2(d), at 467-68 (discussing *Filer v. Smith*). More recent fourth amendment decisions seem to have ignored this holding.

There are a few other scattered decisions ruling certain kinds of searches unreasonable despite probable cause to conduct them. One court, for example, has ruled that surgery to remove evidence of a crime is illegal unless consent is obtained. Adams v. State, 260 Ind. 663, 668, 299 N.E.2d 834, 838 (1973), *cert. denied*, 415 U.S. 935 (1974). Other courts balance the competing interests to determine if surgery may be compelled. *See* United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976) (en banc) (surgery to remove bullet allowed when no danger to defendant), *cert. denied*, 429 U.S. 1062 (1977); Allison v. State, 129 Ga. App. 364, 365, 199 S.E.2d 587, 588-89 (1973), *cert. denied*, 414 U.S. 1145 (1974). *See also* Schmerber v. California, 384 U.S. 757, 770 (1966) (removal of blood allowed while defendant unconscious because delay would allow destruction of evidence). Occasionally, state courts have ruled unconstitutional particularly intrusive searches of homes in pursuit of evidence of minor crimes. *See* McMahon's Administrator v. Druffan, 242 Ky. 785, 787-79, 47 S.W.2d 716, 718-19 (1932) (forcible, malicious search unreasonable); Buckley v. Beaulieu, 105 Me. 56, 60-61, 71 A. 70, 72 (1908) (destruction of interior walls during search of home unreasonable).

216. When one is required, and there are no exigent circumstances, a warrant must be secured before acting.

217. *See* notes 166-72 *supra* and accompanying text (discussing police reactions to *Prouse*).

218. Viewing the exclusionary rule from a different perspective, critics of the rule have pointed out that the sanction is peculiarly inappropriate, for it is geared neither to the gravity of the police misconduct nor to the seriousness of the crime with which the defendant is charged. This has led some commentators to suggest that the rule should apply only to "substantial violations." *See* MODEL CODE OF PRE ARRAIGNMENT PROCEDURE § 290.2(4) (Proposed Official Draft, 1975); TASK FORCE REPORT, *supra* note 31, at 55 (any remedy for violation of constitutional right should be proportional to magnitude of violation). Similarly, others have suggested that it be limited to "less serious" crimes. *See* Kaplan, *supra* note 131, at 1046 (discussing modification to rule that would preclude its application in most serious cases—treason, espionage, murder, armed robbery, and kidnapping). *But see* Allen, *supra* note 64, at 36 (disproportion exists between misbehavior and remedy; nevertheless, limitation to less serious crimes gives police license to proceed in some areas without legal restraint). Justice Rehnquist based his proposal that even if the exclusionary rule is to be retained in the federal courts it should not apply to the states on the fact that state crimes tend to be the most serious ones. California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay). Still others have suggested that in deciding the fourth amendment issue the seriousness of the suspected crime should be weighed in the balance. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 63.

It is also true that application of the exclusionary rule does not always put the government in precisely the position it would have been if its agent had stayed within constitutional bounds, for sometimes the police could have developed probable cause had they pursued their investigation lawfully. Nevertheless, when further avenues of investigation are open to the police, the exclusionary rule simply encourages the police to pursue them. In such cases, its costs to law enforcement should be minimal. When an investigation can only be pursued by trampling on constitutional rights, the exclusionary rule merely imposes on law enforcement the costs that the Constitution itself imposes.

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centive to teach officers those limits, and to demand conformity to them. At the same time, the threat of the exclusionary sanction will not deter the individual policeman from acting when he thinks his actions are lawful.

E. SUMMARY

In light of recent Supreme Court decisions, the exclusionary rule is now premised on deterrence of police misconduct. Both courts and critics, however, have focused little attention on the precise quantum of deterrence necessary to justify the continued existence of the rule. The probable cause standard of the fourth amendment offers an appropriate measure of how effectively the exclusionary rule need deter to justify its continued existence as a purely prophylactic measure.

The exclusionary rule operates as a special deterrent, and as a general deterrent. The rule also operates in a more complex way to deter fourth amendment violations. Its very existence forcefully conveys to the police the importance that society attaches to the constitutional constraints that govern their actions. The threat that it will be applied when constitutional violations occur induces police departments to instruct their officers in fourth amendment law, and to train them to abide by that law. At the same time, exclusionary rule litigation provides the primary opportunity for the courts to announce what the fourth amendment requires, and to develop guidelines for the police to meet those requirements. A court's statement of what is lawful and what is unlawful conduct carries its own moral force,[219] and is backed by the threat of the exclusionary sanction. Police department responses to *Delaware v. Prouse* demonstrate both the success of the exclusionary rule as a systemic deterrent and the contribution of the rule to the development of fourth amendment law.

Finally, the exclusionary rule not only effectively deters police misconduct but also provides the best device for enforcing the fourth amendment. Exclusive reliance on the alternative of a tort remedy would derail the development of fourth amendment law. If it succeeded as a deterrent to illegal police practices, it would also deter legal police conduct that is close to the line of illegality to a far greater extent than does the exclusionary rule. Thus, as measured against the standards of the fourth amendment itself, the exclusionary rule remains an essential mechanism for deterring illegal police conduct. As this article will argue, a good faith exception would subvert this important function.

IV. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE: AN EXAMINATION OF *UNITED STATES V. WILLIAMS*

As our review of the exclusionary rule's evolution has indicated, the dominant rationale for the application of the rule is now deterrence of illegal police conduct. Nevertheless, judges and commentators continue to quarrel over whether the exclusionary rule does in fact deter, and whether this deterrence justifies the consequent costs of excluded evidence and freed criminals.[220]

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219. *See generally* F. ZIMRING & G. HAWKINS, *supra* note 138 (moral force of law as deterrent to its violation).

220. *See generally* note 103 *supra* (citing commentary on deterrent effect of exclusionary rule).

Recently, the exclusionary rule has come under attack as providing a remedy that is often excessive in proportion to the magnitude of the fourth amendment violation.[221] In its August, 1981 report, the Attorney General's Task Force on Violent Crime found that "[t]he fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law . . .—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial."[222] Because "the rule necessarily fails in its deterrent purpose" when applied to the "good faith" efforts of police officers to comply with the law, the Task Force recommended that the Attorney General support a good faith exception.[223]

In support of its recommendation, the Task Force cited only the deterrence rationale expressed in *Mapp* and the Fifth Circuit's en banc decision in *United States v. Williams*.[224] Moreover, the Task Force did not qualify its recommendation in any way to indicate possible shortcomings of the good faith exception, either conceptually or as the Fifth Circuit applied it. Because a good faith exception may very well negate the most important advantages of the exclusionary rule, these weaknesses must be recognized and addressed. Using the *Williams* decision as an example of the good faith exception in theory and in practice, this section questions the exception's underlying premise, criticizes both its substantive content and its procedural application, and doubts the *Williams* court's precedential support for its adoption. After discussing the exception at length in the *Williams* context, the section focuses on the jurisprudential problems that are inherent in a good faith exception both theoretically and as the *Williams* court formulated it.

A. THE DECISION IN *WILLIAMS*

In June, 1976, Special Agent Paul Markonni of the Drug Enforcement Administration (DEA) arrested Jo Ann Williams in Toledo, Ohio, for possession of heroin in violation of the Controlled Substances Act.[225] In March of the following year, after the district court denied her motion to suppress the her-

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221. *See generally* Posner, *supra* note 44, at 7; TASK FORCE REPORT, *supra* note 31, at 55-56.

222. TASK FORCE REPORT, *supra* note 31, at 55. If this passage implies that the courts have become increasingly expansive in their application of the exclusionary rule, in comparison with years past, it is plainly misleading. *Compare* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Court held invalid grand jury subpoenas based on illegally-seized evidence) *and* note 53 *supra* (discussing broad reach of exclusionary rule in early cases) *with* United States v. Calandra, 414 U.S. 338, 354 (1974) (Court upheld grand jury questions based on evidence obtained from unlawful search and seizure).

223. *Id.* at 55-56.

224. *Id.* at 55 (citing Mapp v. Ohio, 367 U.S. 643, 656 (1961); United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981)).

225. United States v. Williams, 622 F.2d 830, 833 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

21 U.S.C. § 841(a)(1) (1976), the provision Williams allegedly violated, provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

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oin, Williams pleaded guilty and was sentenced to three years imprisonment.[226] Subsequently, she appealed the denial of her suppression motion[227] and was released on bond pending appeal.[228] As a condition of her release, the court imposed travel restrictions that required Williams to remain in Ohio.[229]

In September, 1977, Agent Markonni, while on temporary assignment at Atlanta International Airport, recognized Williams as she disembarked from a nonstop flight from Los Angeles.[230] Markonni was aware of the travel restrictions on Williams' appeal bond.[231] He also knew that her Ohio conviction was based on heroin that she had obtained in Los Angeles.[232] Acting on the basis of this information, he approached her, identified himself, and asked her for identification and her airline ticket.[233] The ticket showed that Williams was bound for Lexington, Kentucky.[234] When Markonni asked her if she had permission to travel outside Ohio, Williams responded, "No, this is the first time."[235] When Markonni asked her why she was going to Lexington, she replied that she now lived there.[236] Markonni then arrested her for violating the travel restriction on her appeal bond and ordered other agents to search her incident to the arrest.[237] The search uncovered a packet of heroin in her coat pocket.[238] Markonni then arrested Williams again—this time for violating the Controlled Substances Act, the same offense he had arrested her for fifteen months earlier in Toledo.[239]

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226. 622 F.2d at 833.
227. *Id.*
228. *Id.* Such release is authorized by 18 U.S.C. § 3148 (1976), which provides in part:

> A person . . . (2) who has been convicted of an offense and . . . has filed an appeal . . . shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

Id.
229. 622 F.2d at 833. The impositon of travel restrictions as a condition of release pending appeal is authorized by 18 U.S.C. § 3146(a)(2) (1976), which provides:

> (a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:
>
> . . . .
>
> (2) place restrictions on the travel, association, or place of abode of the person during the period of release . . . .

Id.
230. 622 F.2d at 834.
231. *Id.*
232. *Id.* at 834 n.8.
233. *Id.* at 834.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* The next day, Markonni obtained a search warrant for Williams' luggage based both on the

In November, 1977,
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242. *Id.* She also contended t
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243. *Id.*
244. United States v. Williams
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States or a felony under 21 U.S.C.
246. 594 F.2d at 90.

In November, 1977, Williams was indicted.[240] At a pretrial hearing, she argued that Markonni had no authority to arrest her for violating bond restrictions,[241] and moved to suppress all evidence of the heroin.[242] The district court agreed and suppressed the evidence;[243] the government appealed.[244]

On appeal before a panel of the United States Court of Appeals for the Fifth Circuit, the government contended that Agent Markonni's arrest of Williams was lawful on two theories.[245] First, it argued that Markonni had probable cause to arrest Williams for bail jumping.[246] The panel rejected this argument, holding that bail jumping must involve a willful failure to appear in court, and that Markonni had no reason to believe that Williams had missed a court ap-

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heroin found in her coat and Markonni's past experience with her. *Id.* at 834-35. The ensuing search of her luggage revealed more heroin. *Id.* at 835.

240. The indictment contained two counts: one based on the heroin found on her person; the other based on the heroin found in her luggage. *Id.*

241. *Id.*

242. *Id.* She also contended that the heroin recovered from her luggage was inadmissible as the fruit of the initial unlawful search of her coat. *Id.*

243. *Id.*

244. United States v. Williams, 594 F.2d 86, 97-98 (5th Cir. 1979), *rev'd*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

245. 594 F.2d at 90. A discussion of the considerations relevant to the determination of the initial question before the *Williams* court is necessary to an understanding of the court's good faith inquiry. The validity of Williams' arrest turns on the interplay of three statutes: 21 U.S.C. § 878(3) (1976), which defines the authority of DEA agents to arrest without a warrant; the Bail Reform Act, 18 U.S.C. §§ 3141-3152 (1976), which establishes the framework for release on bail; and 18 U.S.C. § 401(3) (1976), which defines the power of a court to punish for contempt.

Under 21 U.S.C. § 878(3), Markonni could lawfully arrest Williams if she was committing an offense against the United States in his presence or if he had probable cause to believe she had committed or was committing a felony. Here, it was undisputed that Williams was violating a condition of her release on bond when she traveled outside Ohio without the court's permission, and that Markonni knew with certainty about the travel restrictions. The issue, therefore, was whether Williams' conduct constituted either an offense against the United States or a felony. Neither the Bail Reform Act nor 18 U.S.C. § 401(3), however, provide a ready answer to this question. Although 18 U.S.C. § 3146 explicitly gives the court power to impose conditions of release, including travel restrictions, it does not expressly establish criminal sanctions for violations of imposed conditions. The only express criminal penalty set out in the statute is for "bail jumping," an offense defined as the willful failure to appear in court as ordered. 18 U.S.C. § 3150 (1976). Williams, however, had not missed any court appearances, and Markonni had no reason to believe that she had. Nevertheless, Williams was susceptible to arrest. Under 18 U.S.C. § 3146(2), the judge who imposed the travel restriction is authorized to issue an arrest warrant upon violation of this condition. In this case, however, no such warrant was issued.

Another possible ground for arrest was that, by violating her travel restrictions, Williams was subject to the penalties of criminal contempt because the Bail Reform Act does not interfere with the court's power to punish for contempt. 18 U.S.C. § 3151 (1976). Whether Williams' violation of her travel restrictions necessarily constituted contempt under 18 U.S.C. § 401(3), however, is an open question. A literal reading of section 401(3) suggests that disobedience of a court order constitutes contempt, punishable by fine or imprisonment. *See* United States v. Williams, 622 F.2d at 836. It is arguable, however, that a court may use its discretion when dealing with a violation of a bond condition and should declare contempt of court only in extreme cases. *See* United States v. Williams, 594 F.2d at 93. Moreover, even if the violation constituted contempt, it is uncertain whether an arrest may be made without the court's first issuing a warrant. Because contempt is a violation against the court, the reasoning would go, only a court should be authorized to initiate the process leading to possible sanctions. If the court determines that it is appropriate to issue a warrant, a DEA agent would then be authorized to arrest. *See* 594 F.2d at 92-93 (courts, not DEA agents, are vested with power to punish bond violations; DEA agents have no implied arrest power under § 401(3)). In sum, determining the lawfulness of Markonni's arrest involves difficult questions of the scope of the Bail Reform Act and 18 U.S.C. § 401(3). Only if Williams' conduct can be interpreted as a criminal violation of the Bail Reform Act or criminal contempt under 18 U.S.C. § 401(3), and thus, be considered an offense against the United States or a felony under 21 U.S.C. § 878(3), can Markonni's arrest of Williams be lawful.

246. 594 F.2d at 90.

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pearance.[247] Second, the government argued that although Markonni may have characterized his action as an arrest for bail jumping, it was grounded on his knowledge that Williams was violating a condition of her release and thus should be construed as an arrest for that violation, which the government maintained constituted a criminal offense.[248] The panel rejected this contention as well, holding that a violation of a bond condition "is not a criminal offense . . . but merely sets the judicial machinery in motion and empowers a court, not a DEA agent, to determine whether punitive action is warranted."[249] The panel concluded that although Markonni "had reason to believe defendant Williams was violating the conditions of her bond, he did not have probable cause to believe a *criminal offense* had been or was being committed . . . ."[250] The panel, therefore, affirmed the district court's order suppressing the heroin.[251]

Dissenting from the panel's decision, Judge Charles Clark argued that the exclusionary rule should not bar the fruits of Williams' arrest. He based his reasoning on two premises:

> The purpose of the exclusionary rule is to take away any temptation of law enforcement officials to knowingly violate the rights of citizens by denying to the public proof of criminal conduct disclosed by such wrongful police activity . . . . In order for the exclusionary rule to serve its deterrent purpose, the officer must act in a way he either knew or should have known was wrongful.[252]

Thus, in Judge Clark's view, Markonni did only what "any reasonable, practical officer would have considered the law required him to do,"[253] and therefore, suppression of the evidence would not have the appropriate deterrent effect.[254]

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247. *Id.* at 91-92.

248. *Id.* at 94.

249. The court held that a violation of a bond condition is not a criminal offense under section 3146(c). *Id.* at 93.

250. *Id.* at 95.

251. *Id.* The panel also suppressed the heroin seized pursuant to the warrant from Williams' suitcase as fruit of the illegal arrest. *Id.* at 95-96.

252. *Id.* at 97 (Clark J., dissenting).

253. *Id.*

254. *Id.* Although Judge Clark disagreed with the majority's holding that the evidence should have been suppressed, he did agree that Williams' arrest was "legally wrong." *Id.* In fact, Judge Clark suggested that Markonni might be civilly liable for his actions. "If this were a suit for false arrest," he wrote, "I would have no difficulty in concurring in the majority's impeccable reasoning." *Id.* Like other opponents of the exclusionary rule who have sought to make its elimination more palatable by suggesting that an effective tort remedy should replace it, Clark never explained why he would impose tort liability for a good faith fourth amendment violation when he would not apply the exclusionary rule to the fruits of the same violation. If, as Clark contended, Markonni did only what a reasonable, practical police officer would do, it would be unfair to hold him civilly liable.

In addition to this equitable and logical inconsistency, imposing civil liability makes little sense from a practical standpoint. It would have a much greater negative effect on police activity than applying the exclusionary rule. *See* notes 203-19 *supra* and accompanying text (discussing alternative tort remedy). If, as Judge Clark argues, suppressing evidence "may have the deleterious effect of making the officer 'on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal,'" 594 F.2d at 97-98, the prospect of personal liability from a tort action would have an even greater inhibitive effect on police officers and consequently exacerbate the problem Judge Clark perceives. *See* text accompanying notes 215-16 *supra* (discussing inhibitive effect of tort liability).

The Fifth Circuit, on its own motion, granted rehearing en banc.[255] Although the government had argued before the panel only that the arrest and search were lawful, it filed a supplemental brief urging the en banc court to adopt an exception to the exclusionary rule along the lines suggested in Judge Clark's dissent.[256] In an extraordinary disposition of the case, the en banc court simultaneously issued two separate opinions, each of which "command[ed] a majority of the court," and reversed the decision of the district court for "reasons assigned in these alternate resolutions."[257] Two special concurrences were filed, but none of the judges dissented; all twenty-four judges joined one of the two majority opinions, and five judges joined both.[258]

The first en banc majority opinion dealt solely with the lawfulness of Agent Markonni's conduct. In this opinion, the court reversed the district court and held: first, that a violation of a condition of release is criminal contempt; and second, that because criminal contempt is an offense against the United States, Markonni had authority to arrest Williams for that offense when she committed it in his presence.[259] On the basis of this reasoning, a sixteen-judge majority concluded that the heroin should not have been suppressed because Agent Markonni did not violate the fourth amendment.[260]

The thirteen-judge second majority[261] considered the determination of the arrest's validity unnecessary to the suppression question: "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though

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255. 594 F.2d 98 (5th Cir. 1979).

256. *See* Supplemental Brief for Appellant on Rehearing En Banc 5-6, United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

257. 622 F.2d at 833.

258. *Id.* at 833, 840, 847, 848. Two judges who joined in the second majority opinion concurred specially to explain that the approach of that opinion was correct because it disposed of the case without addressing the constitutional question. *Id.* at 847-48 (Hill, J., with Fay, J., concurring specially). They stressed that it was proper to decide whether the fruits of the arrest were admissible under the good faith exception to the exclusionary rule, and thus avoid the constitutional issue whether the search was valid. *Id.* at 847.

Ten of the eleven judges who joined the first, but not the second, majority opinion also concurred specially. *Id.* at 848 (Rubin, J., with Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate & Thomas A. Clark, JJ., concurring specially). Noting that none of the twenty-four judges expressed any doubt that Williams' arrest was lawful, these judges contended that no alternative ground for a decision was necessary, and therefore judicial self-restraint was required. *Id.* They expressed regret that the case had been "utilized as a vehicle to disseminate a doctrine unnecessary to decision." *Id.* at 851. The concurrence also questioned the second majority's premise that deterrence is the exclusive purpose behind the exclusionary rule. *Id.* at 849-50. Although the judges who joined the second special concurrence took issue with both the propriety of the second majority opinion and its premise concerning the purpose of the exclusionary rule, they did not address the "merit or lack thereof" of the good faith exception. *Id.* at 851. The concurrence did state, however, that the announcement of the good faith exception created "a host of interpretive problems" that warrant debate. *Id.* at 850 n.4.

Judge Henderson was the only judge who joined the first majority opinion, but who did not also join either the second majority or the special concurrence.

259. *Id.* at 836-39 (first majority opinion). The first majority reasoned that Williams' willful breach of her bond restriction constituted contempt under 18 U.S.C. § 401(3). 622 F.2d at 836. Although Markonni was not authorized to punish this violation pursuant to section 401(3), which only empowers courts to act, the first majority held that Markonni could arrest Williams under 21 U.S.C. § 878(3) for her conduct, which it deemed to have been an offense against the United States. 622 F.2d at 839.

260. *Id.*

261. Subsequent references to *Williams* or the *Williams* court in this article are to this second majority opinion and the thirteen judges who supported it.

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mistaken, belief that they are authorized."[262] Thus, in adopting this good faith exception to the exclusionary rule, the second majority also concluded that the heroin should not have been suppressed, but for a different reason. The second majority decided that although Agent Markonni may have violated Williams' fourth amendment rights, he acted reasonably and in good faith. Thus, despite any government illegality, the court concluded that the evidence should be admitted at trial against Williams.

The *Williams* opinion reflects the shortcomings of both the good faith exception itself and the Fifth Circuit's attempt to apply it. This article next examines these two problems, beginning with the flaws in the *Williams* court's application of the exception. These flaws stem primarily from the court's failure to apply its own test properly, but they are symptomatic of the difficulties that are inherent in the good faith exception to the exclusionary rule formulated by the *Williams* court.

B. THE COURT'S APPLICATION OF THE EXCEPTION

The initial problem with *Williams* is that the first majority's determination that Agent Markonni's arrest of Williams was lawful renders the alternate resolution by the second majority superfluous.[263] The difficulty here is not simply that either decision can be seen as dictum.[264] Rather, because the first opinion held that the arrest was lawful, the good faith, reasonable "misconduct" upon which the second majority based its holding never in fact occurred. With the precise nature of the "misconduct" undefined, it is impossible to determine whether a fourth amendment violation actually occurred, or even whether the mistake was reasonable and made in good faith.

The problem with such a notion is clear from the good faith approach itself: when a criminal defendant challenges police conduct by a motion to suppress, the court's application of the exclusionary rule must turn on whether the officer acted reasonably and in the good faith belief his actions were lawful. Thus, the good faith inquiry is dispositive of the suppression decision. A court applying this approach need *only* inquire into the reasonableness and good faith of the officer's action; like the *Williams* court, it need not determine conclusively whether these actions violated the defendant's fourth amendment rights.

The second difficulty with the *Williams* court's application of the good faith

262. *Id.* at 840 (second majority opinion).

263. This view was expressed in Judge Rubin's special concurrence and was supported by 10 of the Fifth Circuit's 24 then active circuit judges. 622 F.2d at 848 (Rubin, J., with Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate & Thomas A. Clark, JJ., concurring specially). A divergent view, however was taken by Judge Hill, who argued in a separate special concurrence that the second majority's approach was sensible because it allowed the court to address the admissibility of evidence without considering constitutional questions. *Id.* at 847 (Hill, J., with Fay, J., concurring specially). Now that the Fifth Circuit has been divided into two separate courts, the Fifth and Eleventh Circuits, the status of *Williams* may be uncertain.

264. In United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980), a three-judge panel of the Fifth Circuit described the second majority opinion in *Williams* as "dicta on limited good faith exception to [the] exclusionary rule." *Id.* at 420. The *Fitzharris* court was discussing possible justifications for a warrantless search of defendants' ranch, and mentioned *Williams* in a "*See also*" citation with the above parenthetical description. The *Fitzharris* opinion was written by Judge Henderson, who concurred in the first *Williams* majority opinion. The other panel members were Judge Rubin, who concurred in the first *Williams* opinion and also wrote the special concurrence attacking the second majority opinion, and Judge Reavley, who concurred in the second *Williams* majority opinion.

exception is related to the first. Because "[n]either Markonni's good faith nor [the arrest's] reasonableness" was challenged,[265] the *Williams* court did not conduct an analysis of Markonni's conduct. Obviously, the first majority's opinion made a remand for findings on Markonni's good faith and reasonableness unnecessary.[266] Nevertheless, the rationale of the good faith exception to the exclusionary rule requires that the second majority have made such findings. The Fifth Circuit's failure to consider Markonni's good faith and reasonableness deprived Williams of any opportunity to challenge his conduct. Williams, of course, had no reason to question Markonni's good faith or reasonableness because under then-existing law her burden was only to convince the court that Markonni had violated her constitutional rights.

Because the court never examined Markonni's actions one can only imagine what type of analysis the good faith exception mandates, or what kind of evidence Williams' defense counsel would have offered to challenge the application of the exception in this case. The good faith analysis is not difficult to hypothesize. The terms "reasonableness" and "good faith" suggest relatively straightforward standards: the former connotes an objective test; the latter, a subjective standard.[267] Nevertheless, an objective and subjective analysis of Markonni's actions in this case, when viewed in light of the evidence Williams' counsel could have introduced, points to the conclusion that his "misconduct" would not fall within a good faith exception.

Although the court failed to define clearly the nature of Markonni's misconduct, it did hint that his mistake was in believing that Williams' violation of her travel restriction constituted an offense against the United States.[268] If this had been Markonni's mistake, it would certainly have been an understandable one. As the *Williams* court pointed out, no court before the panel decision had confronted the question whether such a violation is an offense against the United States.[269] Thus, because of this uncertainty of the state of the law and because Markonni had authority to arrest for an offense against the United States,[270] his actions would have fallen within the scope of the good faith exception.

The record, however, which the *Williams* court conveniently ignored, indicates that Markonni's actual mistake had nothing to do with whether a bond violation constitutes an offense against the United States. Markonni's testimony at the suppression hearing demonstrates that the mistake he actually made was in thinking that Williams, by violating a condition of her release, had committed the felony of bail jumping, an infraction punishable under 18 U.S.C. § 3150.[271] The testimony is revealing:

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265. 622 F.2d at 847 (second majority opinion).

266. The first majority found that "the arrest . . . was legal, the search . . . proper and the heroin . . . was lawfully seized." *Id.* at 839 (first majority opinion). Because this opinion held the conduct lawful, there would be nothing to decide on remand.

267. This is not to say, however, that the tests will be easy to administer. *See* text accompanying notes 474-86 *infra* (discussing problems in administering *Williams* good faith exception).

268. 622 F.2d at 846 (second majority opinion).

269. *Id.*

270. *Id.*

271. 18 U.S.C. § 3150 (1976); *see* note 245 *supra* (discussing statute).

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> Q. You had not observed Jo Ann Williams in your presence commit any act which constituted a felony, did you?
> A. I would have to say I did.
> Q. And what was that, sir?
> A. Well, because bail jumping and violating her bond restriction, as I understand it, is a felony, and everyone who is placed on bond is warned that violating bond restrictions or jumping bond is a felony punishable by up to five years in prison or up to a five thousand dollar fine.
> Q. So it would be accurate for me to say then, sir, that at the time that you arrested Jo Ann Williams on September 28, 1977, at the Atlanta Airport, you observed a felony which you felt was the jumping of bail, is that correct, sir?
> A. By being in violation of her bond restrictions.[272]

Such a mistake about the reach of section 3150 can hardly be considered "grounded in an objective reasonableness."[273] Section 3150 unambiguously applies only to willful failures to appear in court as ordered.[274] The Fifth Circuit traditionally has interpreted the statute as the plain language requires,[275] and the panel followed precedent when it addressed this issue.[276] Markonni had no reason to be unsure about the state of this area of the law. The language was plain, and the interpretation of the statute had been consistent. In fact, when the government reargued the case before the en banc court, it dropped the argument it had made to the panel that Markonni's arrest of Williams was justified under section 3150. Thus, Markonni's mistake was not objectively reasonable.

Further, if Markonni was unclear about the statute's meaning, it was unreasonable for him to fail to learn the scope of section 3150. If Markonni anticipated confronting Williams, and made himself aware of her travel restrictions, his failure to investigate whether a bail violation consititutes bond jumping before they met again in Atlanta also must be considered unreasonable.

The good faith exception also requires a court to assess the officer's subjective good faith. In *Williams*, the necessity of examining Agent Markonni's subjective good faith at the time of the arrest raises interesting possibilities that were never pursued in the trial court, perhaps because no one anticipated how the case later would be decided on appeal. It appears, however, that a searching inquiry into Markonni's subjective good faith in arresting Williams would have required examining his past record of arrests and searches. If Williams

272. Record at 25-26, United States v. Williams, Cr. 77-305A (N.D. Ga. 1977).
273. 622 F.2d at 841 n.4a.
274. 18 U.S.C. § 3150 (1976) provides in part:

> Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required . . . shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal . . . after conviction . . . be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

Id.
275. *See* United States v. Bright, 541 F.2d 471, 474 (5th Cir. 1976) (essence of crime of bail jumping is willful failure to appear before court as ordered), *cert. denied*, 430 U.S. 935 (1977); United States v. Logan, 505 F.2d 35, 37 (5th Cir. 1974) (same).
276. 594 F.2d at 91.

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had been given the opportunity to undertake this examination, an enterprising defense counsel would have learned that DEA Special Agent Paul J. Markonni is no fourth amendment neophyte. Numerous prior suppression cases have addressed the legality of his actions.[277] As the *Williams* court knew from the government's brief, the Sixth Circuit had already recognized Markonni's accomplishments as a fourth amendment trailblazer, and had noted that "Markonni has amassed an impressive drug enforcement record in Detroit, resulting in a number of opinions of this Court exploring the boundaries of permissible police activity in dealing with the difficult problem of drug trafficking."[278] Thus, a review of Markonni's fourth amendment career might shed some light on the inadvertency of his error in *Williams*.

Agent Markonni's work has involved policing airports for drug couriers.[279] In most of his early exploits, he relied on a straight-forward theory of probable cause, followed by a search incident to the arrest, to justify seizure of the sought-after evidence.[280] Although Markonni often has been successful, he

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277. We have found these additional cases reporting on Markonni's efforts, which have sometimes involved genuinely creative efforts to refashion fourth amendment law: United States v. Herbst, 641 F.2d 1161 (5th Cir. 1981); United States v. Berry, 636 F.2d 1075, 1077 (5th Cir. 1981); United States v. Berd, 634 F.2d 979, 981 (5th Cir. 1981); United States v. Turner, 628 F.2d 461 (5th Cir. 1980); United States v. Canady, 615 F.2d 694 (5th Cir. 1980); United States v. Andrews, 600 F.2d 563, 565 (6th Cir. 1979); United States v. Roundtree, 596 F.2d 672, 673 (5th Cir. 1979); United States v. Elmore, 595 F.2d 1036, 1037 (5th Cir. 1979); United States v. Troutman, 590 F.2d 604, 605 (5th Cir. 1979); United States v. Lewis, 556 F.2d 385, 387 (6th Cir. 1977); United States v. McCaleb, 552 F.2d 717, 719 (6th Cir. 1977); United States v. Hunter, 550 F. 2d 1066, 1068 (6th Cir. 1977); United States v. Prince, 548 F.2d 164 (6th Cir. 1977); United States v. Pratter, 465 F.2d, 227, 229 (7th Cir. 1972); United States v. One 1976 Cadillac Seville, 477 F. Supp. 879, 880 (E.D. Mich. 1979); United States v. McClain, 452 F. Supp 195, 196 (E.D. Mich 1977); United States v. Coleman, 450 F. Supp. 433, 435 (E.D. Mich. 1978); United States v. Dewberry, 425 F. Supp. 1336 (E.D. Mich 1977); United States v. Miles, 425 F. Supp 1256 (E.D. Mich 1977); United States v. Allen, 421 F. Supp. 1372 (E.D. Mich. 1976); United States v. Floyd, 418 F. Supp. 721 (E.D. Mich. 1976); United States v. Griffin, 413 F. Supp. 178 (E.D. Mich. 1976); United States v. Scott, 406 F. Supp. 443 (E.D. Mich. 1976).

278. United States v. Wright, 577 F.2d 378, 379 (6th Cir. 1978), *cited in* Supplemental Brief for Appellant on Rehearing En Banc at 12 n.2, United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

279. Most of his cases have involved airport encounters. At one point Markonni estimated that he had made 175 arrests at the Detroit Metropolitan Airport alone. United States v. Allen, 421 F. Supp. 1372, 1374 n.1 (E.D. Mich. 1976).

One of Markonni's earliest cases involved a different type of work and raised issues unlike those of the airport cases that came later. In United States v. Pratter, 465 F.2d 227 (7th Cir. 1972), the court described a raid on a house occupied by two University of Indiana students to seize a package containing hashish that had been shipped to them from Bombay, India inside a plaster of paris statue. *Id.* at 228-29. All of the evidence found in the raid was suppressed, because the agents participating, among them Markonni, waited only a few seconds for a response to their knock at the door before rushing in. *Id.* at 232-33. The court, in an opinion by Judge (now Justice) Stevens, held that the agents had not been refused entry before their break in. *Id.*

Markonni, a minor actor in the drama, showed signs of the enterprising attitude that would stamp his later efforts. The "second or two," or "couple seconds," that in the lead agent's testimony separated their announcement of authority and purpose from the break-in became, when Markonni testified, "[s]everal seconds; I would say probably ten seconds, ten to fifteen seconds." *Id.* at 229 n.2. Markonni did admit, however, that "I hadn't actually planned to enter the residence that soon . . . ." *Id.*

280. United States v. Dewberry, 425 F. Supp. 1336 (E.D. Mich. 1977), is a typical case from this period in Markonni's career. While on duty at the Detroit Metropolitan Airport, Markonni saw two women depart a flight from Los Angeles and join a man who was waiting for them. *Id.* at 1337. Markonni thought he recognized the man, Michael Lee, as a drug trafficker whom he had encountered in another case. *Id.* Lee wrote a name, address, and phone number on a piece of paper and handed it to a third woman who had joined the group. *Id.* The third woman, rather than the passengers, went to claim the baggage. *Id.* As Lee and the two other women then tried to leave the airport, agents accompanying Markonni stopped and questioned them. *Id.* When they responded evasively, the agents took them to a private office in the airport. *Id.* Markonni then brought the third woman and the suitcase she had claimed into the same office. *Id.* at 1338. The agents placed Lee and the three women under

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also has suffered his share of set-backs.[281] Sometimes, Markonni's frustrations have resulted from his more inventive approaches to airport drug enforcement. In *United States v. Wright*,[282] for example, Markonni retrieved a suspect's suitcases from the airport baggage claim area and brought them to the suspect.[283] Markonni then arrested him in an attempt to justify a search of the suitcases as incident to the arrest.[284] The Sixth Circuit concluded that Markonni had gone too far; it declined to sanction this manipulation of the doctrine of search incident to arrest and held that the heroin Markonni had found should have been suppressed.[285]

More recently Markonni has relied on the suspect's purported voluntary cooperation to sidestep fourth amendment requirements. Because detaining suspects during initial questioning requires a showing of articulable suspicion, Markonni has tried to leave them free to walk away, at least in the eyes of the law.[286] Similarly, instead of forcing suspects to accompany him to an office at the airport for additional questioning, and thereby run the risk that a court will require probable cause yet find it absent (as happened earlier in his career), Markonni has encouraged his suspects to come along voluntarily.[287] Once

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arrest and then searched the suitcase, where they discoverd heroin. *Id.* The district court held that the initial stop was based on reasonable suspicion and that the evasive responses gave the agents probable cause to arrest. *Id.* Thus, the search of the suitcase was proper as incident to a valid arrest and the heroin was admissible. *Id.*

281. In several cases courts have suppressed evidence because Markonni detained or arrested on insufficient cause. *See, e.g.*, United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) (no probable cause to arrest suspect who appeared nervous and matched DEA profile); United States v. McClain, 452 F. Supp. 195, 199-200 (E.D. Mich. 1977) (no probable cause to arrest suspect who appeared nervous and exhibited other innocent behavior); United States v. Coleman, 450 F. Supp. 433, 440-41 (E.D. Mich. 1978) (no probable cause to arrest suspect who was black and not carrying luggage); United States v. Miles, 425 F. Supp. 1256, 1259 (E.D. Mich. 1977) (no probable cause to arrest suspect based on anonymous tip and observation of suspect meeting description engaged in innocent behavior); United States v. Floyd, 418 F. Supp. 724, 728 (E.D. Mich. 1976) (no probable cause to arrest suspects who were nervous, trying not to appear together, and carrying little luggage); United States v. Van Lewis, 409 F. Supp. 535, 543 (E.D. Mich. 1976) (no probable cause to arrest suspect on sole basis of DEA profile), *aff'd on other grounds*, 556 F.2d 385 (6th Cir. 1977).

Figuring in several of these cases was the suspect's resemblance to the Drug Enforcement Administration's "drug courier profile," which is a list of characteristics, each of which is innocent in itself, but which, in combination, the DEA deems typical of airline passengers who are working as drug couriers. Markonni himself was instrumental in the profile's development. United States v. McClain, 425 F. Supp. at 199. The Sixth Circuit, in *United States v. McCaleb*, found that correspondence with some elements of the profile could not by itself justify a *Terry* stop. 552 F.2d 717, 720 (6th Cir. 1977). The Supreme Court reached a similar conclusion in Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam), (no probable cause for investigatory stop of suspect based on suspect's arrival time, behavior, and point of embarkation).

282. 577 F.2d 378 (6th Cir. 1978).

283. *Id.* at 379.

284. *Id.* at 379-80.

285. *Id.* at 382.

286. *See* United States v. Berry, 636 F.2d 1075, 1079 (5th Cir. 1981) (suspects "seized" when Markonni told them they had violated law); United States v. Berd, 634 F.2d 979, 984-85 (5th Cir. 1981) (no fourth amendment seizure when Markonni merely approached suspects and identified himself).

287. In United States v. Berry, 636 F.2d 1075 (5th Cir. 1981), Markonni asked a pair of suspected drug couriers if they "would accompany him to the DEA office for further questioning" after a noncoercive encounter in the airport heightened the agent's suspicions. *Id.* at 1077. The court held that a "seizure" within the meaning of the fourth amendment occurred "somewhere en route to the DEA office," *id.* at 1079; nevertheless, it proceeded to find that the seizure was reasonable. *Id.* at 1081.

Markonni recently has been forced to operate within the constraints of a Fifth Circuit decision in another one of his cases, which held that a forcible trip to a private office within the airport—there, a Delta Airlines office—is an arrest requiring probable cause, not a mere investigatory detention requiring only articulable suspicion. United States v. Hill, 626 F.2d 429, 433-37 (5th Cir. 1981).

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Canady, 615 F.2d 694, 695-96 (5th
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there he has sought consent to search their luggage rather than trust the sometimes unreliable bounds within which he might conduct a search incident to arrest.[288]

This strategy has not been fool-proof either. Some defendants have disputed Markonni's testimony that they voluntarily consented to his requests.[289] In two cases, for example, courts concluded that Markonni extracted consent through means that rendered it involuntary.[290] On the whole, however, Markonni's strategy of eliciting the voluntary cooperation of suspects has been successful.[291] Further, in a number of cases Markonni has relied on the inclination of suspects to renounce their interest in their baggage, and then searched the bags on the theory that they had been abandoned.[292]

If Williams had had the opportunity to question Markonni's good faith, she might well have drawn attention to these earlier cases. They demonstrate how Markonni has consistently pushed the fourth amendment to the limit and frequently beyond, and arguably suggest that he has not always acted under a good faith belief that his conduct was lawful.

Markonni's career, however, was not the only ground for challenging his good faith in arresting Williams for violating her bond conditions. A close examination of the undeveloped record discloses several tantalizing hints that

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288. *See, e.g.*, United States v. Berry, 636 F.2d 1075, 1077 (5th Cir. 1981) (court will not consider whether defendants' consent was in their own best interests when record indicates consent to search after legal seizure voluntary); United States v. Turner, 628 F.2d 461, 465-66 (5th Cir. 1980) (consent not invalidated by defendant's testimony that agent overbearing when informing defendant of right to refuse consent to search); United States v. Elmore, 595 F.2d 1036, 1038-42 (5th Cir. 1979) (evidence seized in search admissible when defendant voluntarily consented to search, when agents had reasonable basis to ask defendant to consent, and when search conducted in non-coercive manner); *cf.* United States v. Troutman, 590 F.2d 604, 605-06 (5th Cir. 1979) (voluntary consent to search eliminates taint of illegal initial stop of suspect).

289. *See, e.g.*, United States v. Berry, 636 F.2d 1075, 1077 n.1 (5th Cir. 1981) (defendant denied consenting to search); United States v. Turner, 628 F.2d 461, 465 (5th Cir. 1981) (same); United States v. Troutman, 590 F.2d 604, 605-06 (5th Cir. 1979) (same).

290. United States v. McCaleb, 552 F.2d 717, 721 (6th Cir. 1977) (involuntary consent suggested by unconstitutional stop and arrest and statement by agent that suspect would be detained if he did not consent to search); United States v. McLain, 452 F. Supp. 195, 201 (E.D. Mich. 1977) (citing *McCaleb* in invalidating search under similar circumstances).

291. The attractiveness of seeking assistance from suspects in their own apprehension as a law enforcement technique has no doubt increased in light of two recent Supreme Court decisions, United States v. Mendenhall, 446 U.S. 544 (1980), and Reid v. Georgia, 448 U.S. 438 (1980) (per curiam). In *Mendenhall*, Justice Stewart, writing on this point only for himself and Justice Rehnquist, endorsed a lenient standard for determining when a police-citizen contact is a seizure within the meaning of the fourth amendment, or when a trip to a police office is non-consensual. 446 U.S. at 553-56. In *Reid*, three additional justices expressed general approval of this standard. 448 U.S. at 442-43 (Powell, J., with Burger, C.J. & Blackmun, J., concurring).

In two of Markonni's cases, however, the Fifth Circuit has expressed a limited view of the precedential value of *Reid* and *Mendenhall* on these points. *See* United States v. Berry, 636 F.2d 1075, 1078-79 (5th Cir. 1981) (*Mendenhall* not applicable because only two justices agreed on when seizure of person occurs in police-citizen contact); United States v. Berd, 634 F.2d 979, 984 (5th Cir. 1981) (*Mendenhall* not applicable for reason stated in *Berry*, and *Reid* not applicable because Court did not consider whether agent's initial approach constituted seizure). Consequently, the Fifth Circuit has, in these cases, looked to the standards set in one of its own prior decisions—set another Markonni case—to determine when a seizure had occurred. *See* United States v. Elmore, 595 F.2d 1036, 1042 (5th Cir. 1979) (police-citizen encounter not seizure when agents merely approached suspect and identified selves without using force or physical contact), *cert. denied*, 447 U.S. 910 (1980).

292. *See* United States v. Berd, 634 F.2d 979, 982-83 (5th Cir. 1981) (search upheld when suspect left briefcase on chair accompanying Markonni to office and later denied briefcase his); United States v. Canady, 615 F.2d 694, 695-96 (5th Cir. 1980) (search upheld when suspect repeatedly denied suitcase his).

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Markonni arrested Williams for bond jumping as a mere pretext in order to search her for drugs. To begin with, Markonni's history of creative drug searches suggests that his principal interest was drugs. Further, when Markonni first saw Williams at the airport, he decided not to arrest her immediately, but instead to continue his surveillance.[293] If Markonni's true interest was only Williams' supposed bond jumping violation, he presumably would have arrested her as soon as he saw her. Furthermore, Markonni candidly revealed that drugs were on his mind when he arrested Williams.[294] Before searching her, he told her that he would release her if she had permission to leave Ohio "and if she had no drugs or narcotics on her person."[295] Although Markonni did check with the Ohio prosecutor to see whether Williams' travel restrictions were still in effect, he did not do so until after he had searched Williams and arrested her on drug charges.[296] If Markonni was not simply intent on conducting a search for drugs, and if he was at all solicitous of Williams' right not to be arrested and searched for a speculative offense, he could easily have called a prosecutor before the search while Williams waited. Thus, Markonni's discovery of drugs during his search of Williams was not mere fortuity, but rather seems to have been the intended and expected result of her arrest.

Although the trial record and Markonni's career and testimony at the suppression hearing may not demonstrate beyond all doubt that the agent acted either unreasonably or in bad faith, they do illustrate the kinds of evidence that bear on such determinations.[297] Moreover, insofar as these considerations

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293. *Id.* at 840.

294. Markonni saw Williams disembark from a non-stop flight from Los Angeles. He may have suspected that she was a "mule" for a drug operation, for he knew that Los Angeles was a drug supply center. 594 F.2d at 88, and that it was the source of Williams' drugs when he arrested her the year before. 622 F.2d at 846. Further, he had relied on similar information in the past to justify investigatory stops and arrests. *See, e.g.*, United States v. Hill, 626 F.2d 429, 430-31 (5th Cir. 1980) (suspect arrived from Los Angeles on trip of short duration and matched description of man known to be involved in drug trafficking); United States v. Elmore, 595 F.2d 1036, 1037 (5th Cir. 1979) (suspect arrived in Atlanta from Detroit, was on route to Birmingham, Alabama; Detroit and Birmingham two key cities on DEA distribution-use profile); United States v. Roundtree, 595 F.2d 672, 673 (5th Cir. 1979) (suspect arrived from Los Angeles and appeared to be concealing suspicious bulge on his calf); United States v. Williams, 594 F.2d 86, 88 (5th Cir. 1979) (suspect arrived from Los Angeles and was recognized by Markonni as person he had once arrested on drug charge); United States v. Troutman, 590 F.2d 604, 605 (5th Cir. 1979) (suspect arrived from Los Angeles and exhibited suspicious behavior); United States v. McCaleb, 552 F.2d 717, 719-20 (6th Cir. 1977) (suspect arrived from Los Angeles and conformed to DEA courier profile); United States v. Coleman, 450 F. Supp. 433, 435 (E.D. Mich. 1978) (suspect arrived from Los Angeles and did not carry any luggage); United States v. McClain, 452 F. Supp. 195, 196 (E.D. Mich. 1977) (suspect arrived from Los Angeles and only carried one small suitcase); United States v. Miles, 425 F. Supp. 1256, 1257 (E.D. Mich. 1977) (suspect arrived from Los Angeles and fit anonymous tipster's description); United States v. Allen, 421 F. Supp. 1372, 1373 (E.D. Mich. 1976) (suspect arrived in Detroit from Dallas on flight that might have connected with flight from Los Angeles and appeared nervous); United States v. Floyd, 418 F. Supp. 724, 726 (E.D. Mich. 1976) (suspect arrived from Los Angeles and did not claim any luggage); United States v. Van Lewis, 409 F. Supp. 535, 539-40 (E.D. Mich. 1976) (suspect traveled roundtrip between Detroit and Los Angeles in one day, had almost empty suitcase, and used alias in buying ticket).

295. Record at 27, United States v. Williams, Cr. 77-305A (N.D. Ga. 1977).

296. *Id.*

297. The good faith exception by its very nature will require courts to determine an officer's state of mind at the time of an arrest. Such findings in general are elusive and manipulable because they depend almost solely on the officer's own testimony and recollection. There will be a great temptation for an officer to shade or modify his testimony to portray good faith. This could result in the finding of good faith and the admitting of evidence, even in the extreme cases where an officer made an "honest" mistake for the deliberate purpose of obtaining sought-after evidence. Application of the exclusionary

suggest that Markonni acted unreasonably or in bad faith, they underscore the importance of examining the officer's misconduct, and highlight the Fifth Circuit's crucial error in *Williams*.

More generally, and ultimately more importantly, these cases also illustrate how successes and failures in defending against motions to suppress can shape the conduct of a conscientious law enforcement officer. Although Markonni has continued to operate right at, and frequently just over, the constitutional line, he seems quick to learn where that line is, and has adjusted his conduct accordingly. Thus, in the continuing saga of Agent Markonni's efforts to enforce the nation's narcotics laws within the changing confines of the fourth amendment, we have a remarkable demonstration of the exclusionary rule functioning as a specific deterrent.

C. THE COURT'S JUSTIFICATIONS FOR THE GOOD FAITH EXCEPTION

More important than the *Williams* court's shortcomings in applying its good faith exception to the facts before it, are the flaws in the court's justifications for adopting the exception itself. The claims which the court made for the exception—that it will not affect fourth amendment standards,[298] that it is consistent with the exclusionary rule's deterrence rationale,[299] and that it is supported by precedent[300]—are not only representative of those generally advanced by commentators who have advocated the exception, but are in large part drawn from their writings.[301] Thus, the *Williams* opinion provides a convenient focal point for analyzing the justifications underlying the good faith exception.

In laying the foundation for its good faith approach, the *Williams* court discussed the exclusionary rule in terms of costs and benefits. The court began by emphasizing that the exclusionary rule is "not itself a requirement of the Constitution," but rather a "judge-made rule," the only justification for which "is deterrence of future police misconduct."[302] On the cost side, the court argued that the rule must be considered "in light of its direct effect of preventing the 'whole truth' from being told and its byproducts of freeing guilty criminals and endangering society."[303] The court concluded that the rule should not apply "in those contexts where it does not effectively deter official misconduct."[304]

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rule despite a finding of good faith, at least in those cases where an officer had an ulterior motive for his "good faith" arrest, would protect against sham claims of "honest" mistakes.

There is another reason to be concerned about how carefully courts will scrutinize claims of good faith. In Scott v. United States, 436 U.S. 128 (1978) the Supreme Court said that, in evaluating officers' conduct, courts should use "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." *Id.* at 138. Although *Scott* involved wiretaps rather than traditional searches and seizures, its incorporation into the good faith exception would either eliminate analysis of the validity of officers' assertions of good faith or render such analysis perfunctory at best. Thus, the combination of *Scott* and *Williams* might result in an exception based solely on the objective question of general "reasonableness."

298. 622 F.2d at 847.

299. *Id.* at 842.

300. *Id.* at 843-45.

301. *See* notes 442-45 *infra* and accompanying text (discussing *Williams* court's reliance on secondary authority).

302. *Id.* at 841-42.

303. *Id.* at 842.

304. *Id.* at 841-42.

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As an example of such a context, it cited "improper police actions taken in reasonable good faith" because "it makes no sense to speak of deterring police officers who acted on the good faith belief that their conduct was *legal* by suppressing evidence derived from such actions unless somehow we wish to deter them from acting at all."[305]

Although perhaps appealing in their simplicity, these justifications for the good faith exception are flawed. First, the court expressly denied that the good faith exception will diminish fourth amendment protections: "[I]t will be argued that today's decision undercuts the fourth amendment. Not so; it concerns only the exclusionary rule . . . ."[306] But the very breadth of the court's definition of good faith violation guarantees that many fourth amendment infringements will not even be examined by the courts. Second, the court claimed that the exception is justified because when a police officer acts in good faith the deterrent effect of the exclusionary rule is unnecessary.[307] This argument also must fail because it is based on the invalid premise that the exclusionary rule acts only as a simple deterrent; it ignores the wider effects of both general and systemic deterrence. Third, the court argued that the good faith exception is justified by legal precedent.[308] This contention, however, is based on misinterpretation and distortion of the relevant Supreme Court cases.

1. The Impact on the Fourth Amendment

The *Williams* court's good faith exception to the exclusionary rule has two facets: "technical violations"[309] and "factual mistakes."[310] The court borrowed its definitions from a law review article written by Professor Edna Ball.[311] As the article and the court describe the two branches, they roughly correspond to what are known in the criminal law as mistakes of law and mistakes of fact:

> In fourth amendment cases, most good faith violations concern the failure to meet the requirement of probable cause. Two basic types of violation are possible. First, an officer may make a judgmental error concerning the existence of facts sufficient to constitute probable cause. Such cases may be characterized as examples of "good faith mistake." Second, an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled. In each of these cases, the officer may be deemed to have committed a "technical violation."[312]

This sweeping characterization of good faith violations suggests that the good faith exception may not only cripple the exclusionary rule, but also drastically limit the protections of the fourth amendment. Because only egregious, inten-

305. *Id.* at 842 (emphasis in original).
306. *Id.* at 847.
307. *Id.* at 842.
308. *Id.* at 843-45.
309. *Id.* at 843.
310. *Id.* at 844.
311. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978).
312. *Id.* at 635-36, *cited in* United States v. Williams, 622 F.2d at 843-41.

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313. 622 F.2d at 843.
314. *See* notes 263-66 *supra* and
315. *Id.*
316. *See* United States v. Watson
Arrest of suspect in public place did
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317. *Id.* (1959) (warrantless arrest law
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317. *See* United States v. Robinso
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318. *See* Michigan v. DeFillippo,
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on other grounds, 428 U.S. 465 (1976);
2d Cir. 1974) (arrest pursuant to unco
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tional, and flagrantly illegal police misconduct would fall outside these two branches, the good faith exception will effectively insulate important areas of police misconduct from judicial oversight and control.

The Technical Violation Branch. In its discussion of the "technical violation facet" of the exception, the court averred that "the most common forms of technical violations made in good faith are arrests made in good faith reliance on a statute later declared unconstitutional or, as here, on a reasonable interpretation of a statute that is later construed differently."[313] This assertion is misleading on several counts. To begin with, cases involving a substantive criminal statute subsequently declared unconstitutional or construed differently are, in practice, very rare. Indeed, even *Williams* was not such a case.[314] Markonni's arrest did not involve a good faith, reasonable interpretation of a statute later construed differently.[315] Had *Williams* involved an arrest pursuant to a substantive criminal statute later invalidated or construed differently, the court could have upheld Markonni's conduct without the exception.

This result could have been reached because such cases, correctly understood, do not even raise fourth amendment issues. As long as a reasonably prudent person would be justified in believing that a suspect had committed, or was committing, an offense, an arrest in a public place for that offense is supported by probable cause and satisfies constitutional standards.[316] A search incident to that arrest is similarly valid.[317] The police conduct is lawful because the officer had probable cause at the time of the arrest, not because he acted in good faith. Probable cause at the time of arrest does not dissipate because a substantive criminal statute is later construed differently or held unconstitutional.[318] The same analysis applies to other fourth amendment stan-

313. 622 F.2d at 843.

314. *See* notes 263-66 *supra* and accompanying text (discussion of Markonni's misconduct).

315. *Id.*

316. *See* United States v. Watson, 423 U.S. 411, 414-15, 423-24 (1976) (postal officer's warrantless arrest of suspect in public place did not violate fourth amendment because based on probable cause; officer acted pursuant to constitutional statute authorizing warrantless arrest for felonies when reasonable grounds to believe offense is being or has been committed); Draper v. United States, 358 U.S. 307, 313-14 (1959) (warrantless arrest lawful if officer has probable cause; probable cause exists when facts within officer's knowledge sufficient to justify belief by reasonably cautious man that offense is being or has been committed); Carroll v. United States, 267 U.S. 132, 149 (1924) (warrantless search and seizure supported by probable cause does not violate fourth amendment).

317. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (custodial arrest based on probable cause is reasonable intrusion under fourth amendment; officer may search suspect incident to arrest without additional justification); Chimel v. California, 395 U.S. 752, 763 (1969) (incident to lawful arrest, officer may search arrestee's person and area within his immediate control to remove weapons and seize evidence).

318. *See* Michigan v. DeFillippo, 443 U.S. 31, 37-38 (1979) (officer's arrest of suspect pursuant to presumptively valid city ordinance lawful because action was supported by probable cause; later declaration that ordinance unconstitutional does not affect lawfulness of arrest); Michigan v. Carpenter, 69 Mich. App. 81, 83, 244 N.W.2d 338, 339-40 (1976) (officer's search of automobile pursuant to dangerous weapon statute after observing rifle case in plain view supported by probable cause; subsequent determination that rifle is not dangerous weapon within meaning of statute does not affect lawfulness of search). *But see* Powell v. Stone, 507 F.2d 93, 98 (9th Cir. 1974) (evidence obtained from search incident to arrest under ordinance later declared unconstitutional held not admissible in murder trial), *rev'd on other grounds*, 428 U.S. 465 (1976); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1174 (2d Cir. 1974) (arrest pursuant to unconstitutional statute is unlawful, evidence obtained during search incident to arrest inadmissible at trial); Hall v. United States, 459 F.2d 831, 840 (D.C. Cir. 1972) (en

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dards such as reasonable, articulable suspicion to stop and frisk.[319] Moreover, in such cases the exclusionary rule is unnecessary to test the constitutionality or reach of the criminal statute. A defendant arrested and charged with violating such a statute can directly challenge its constitutionality,[320] or argue that it should be construed in a particular way.

The "most common forms" of technical violations shielded by the good faith exception, however, do involve fourth amendment violations. Such violations include arrests and searches made without probable cause or a warrant, and stops and frisks made without reasonable suspicion, either in reliance on prior court decisions[321] that arguably permit them or pursuant to statutes that explicitly authorize them.[322] Unlike defendants who are arrested for violating criminal statutes of a substantive nature, and who can argue during their case-in-chief that the laws should be invalidated or construed differently, victims of coercive police action carried out pursuant to either a criminal statute or a prior court decision of a procedural nature, have no recourse to challenge the police officer's authority except through a suppression motion. This is because a substantive criminal statute carries its own penalty apart from that which is imposed for crimes uncovered in a search incident to the arrest. Thus, the victim of an arrest under an unconstitutional criminal statute of a substantive character has the opportunity and incentive to vindicate his rights at the trial for that offense. A criminal statute or prior judicial decision of a procedural

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banc) (evidence obtained during search incident to arrest under unconstitutional statute inadmissible at trial).

319. *See* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (per curiam) (officer's stop and frisk is lawful if facts available at moment of conduct justify belief in man of reasonable caution that action taken was appropriate); Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (officer's stop and frisk of suspect does not violate fourth amendment if supported by specific and articulable facts; such intrusion is reasonable if facts available to officer at time of action sufficient to warrant belief by reasonable man that action taken was appropriate).

320. *See* Grayned v. City of Rockford, 408 U.S. 104, 107 (1972) (defendant arrested and convicted pursuant to anti-picketing ordinance; ordinance held unconstitutional and conviction reversed); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (defendant arrested and convicted pursuant to vagrancy ordinance; ordinance held unconstitutional and conviction reversed).

321. By prior court decisions we refer to decisions establishing the ingredients of probable cause in a particular context, such as Aguilar v. Texas, 378 U.S. 108, 114 (1964) (information from informants), decisions delineating the nature and scope of the exceptions to the warrant requirement, such as United States v. Rabinowitz, 339 U.S. 56, 63-65 (1950) (fixing scope of warrantless search incident to valid arrest), *overruled*, Chimel v. California, 395 U.S. 752 (1969), and decisions defining the scope of the fourth amendment itself, such as Olmstead v. United States, 277 U.S. 438, 466 (1928) (search requires physical trespass), *overruled*, Katz v. United States, 389 U.S. 347 (1967).

322. A criminal statute or decision of a procedural character does not describe conduct that is a crime, but rather empowers police in certain instances to obtain warrants, conduct searches, or make arrests. Because the fourth amendment requires that an officer have probable cause before carrying out such actions, and, sometimes, that he secure a warrant as well, a statute or court decision authorizing them on less than probable cause or without a warrant when one is required violates the Constitution. *See* Ybarra v. Illinois, 444 U.S. 85, 90-91 (1979) (officer's search of defendant pursuant to state statute unlawful because not supported by probable cause; officer had no reason to believe defendant committing or had committed offense); *cf.* Payton v. New York, 445 U.S. 573, 588-89 (1980) (officer's warrantless and nonconsensual entry into private residence to arrest defendant pursuant to state statute is unconstitutional; statutory authority for warrantless entry does not affect determination). Although a legislature is free within the bounds of the Constitution to define the elements of a substantive criminal offense, and a court has the power to construe such a statute, neither a legislature nor a court may alter the requirements of the fourth amendment itself. Thus, an officer who violates the fourth amendment in reliance on a statute or decision that purportedly authorizes such conduct may not justify his constitutional infraction on the basis of his good faith or the reasonableness of his actions.

haracter, however, carries no penalty of its own. As a result, a victim of po-ce action undertaken pursuant to such a statute or decision has neither the ncentive nor the opportunity to challenge its constitutionality except through motion to suppress the evidence obtained. A good faith exception that ex-uses unconstitutional conduct taken in reliance on such statutes and decisions emoves that incentive and opportunity, and thereby ensures that police mis-onduct will occur and recur free from judicial correction.

Similarly, when evidence is uncovered in the course of an arrest or search made pursuant to a warrant, the validity of the warrant itself can be challenged only through a motion to suppress. Yet it seems clear that a search or arrest made in reliance on an invalid warrant also will be excused under the technical violations facet of the good faith exception.

While the *Williams* court demonstrated uncharacteristic self restraint by writing in a footnote that because "no warrant is involved here . . . nothing we say applies to factual situations where one has been obtained,"[323] the court's reasoning surely compels the conclusion that when a police officer acts in good faith reliance on a warrant, the fruits of his search should be beyond the reach of the exclusionary rule. Indeed, two of the decisions on which the court relied involve "good faith" searches pursuant to arguably defective warrants.[324] And, in its very definition of a "technical violation" the court included reliance "on a warrant that is later invalidated."[325] Thus, the technical violations branch of the court's exception is far wider than the court acknowledged, for it exempts from the reach of the exclusionary rule the fruits of any unconstitutional police conduct undertaken in good faith reliance on court decisions, statutes, and warrants.

Although the *Williams* court insisted that the good faith exception limits only the exclusionary rule and not the fourth amendment, it was plainly wrong. By defining "technical violations" to include good faith reliance on court decisions, statutes of a procedural nature, and warrants, the court insulated many fourth amendment violations from the deterrent effect of the exclusionary rule. The court justified this result on the ground that the exclusionary rule can have no deterrent effect when a police officer relies in good faith on a statute or prior court decision. This, too, is plainly wrong. By identifying the fourth amendment infirmities in the statute or decision on which the officer has relied, future fourth amendment violations will be prevented. The good faith exception ensures that this process of identification will be delayed or will not occur at all.[326]

The Good Faith Mistake Branch. The court's treatment of the "good faith mistake" branch also demonstrates that the good faith exception affects the fourth amendment as well as the exclusionary rule. The court suggested

323. 622 F.2d at 840 n.1.

324. *Id.* at 844-46 (citing United States v. Janis, 428 U.S. 433, 454 (1976); and United States v. Hill, 506 F.2d 315, 322 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975)). Although the court discusses these cases in the "mistake of fact" portion of its opinion, the court's point seems to be that reliance on a warrant establishes, or at least goes a long way toward establishing, reasonable good faith.

325. 622 F.2d at 841 (quoting Ball, *supra* note 311, at 638-39).

326. Exactly why the good faith exception will have this result is developed in greater detail in text at notes 349-55 *infra*.

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that Agent Markonni made a reasonable good faith mistake in believing that Williams' violation of her bond condition authorized him to arrest her.[327] In addition to the court's error in failing to examine both the record and Markonni's background in addressing the good faith question,[328] this characterization indicates several flaws in the "good faith mistake" branch of the exception as the *Williams* court conceived and applied it.

The court's reasoning here is extremely confusing. To begin with, its characterization of Markonni's good faith mistake, which it describes at one point as "an action under a reasonable factual error about one element of the crime defined in section 3146,"[329] sounds like a mistake of law, rather than a mistake of fact. Indeed, it sounds suspiciously like the very mistake, "an action under a reasonable interpretation of the arrest power under section 3146 that was subsequently reconstrued by our panel," which the court described as an example of a good faith "technical violation."[330] Because section 3146 does not define a crime or have anything to do with arrest powers, it is unlikely to be a technical violation even under that broad rubric.[331] Thus, the court's meaning is unclear.

Not only did the court never specifically identify Markonni's putative mistakes, it failed to distinguish between the two branches of the exception. Nevertheless, the court reached out to fashion the broadest possible good faith exception by describing the case as presenting questions of both a good faith factual mistake and a technical violation.[332] In fact, however, the case presented neither.

Far more disturbing than the court's failure to identify Markonni's putative good faith mistake of fact, is its creation of an exception to the exclusionary rule for such mistakes. By insulating from the exclusionary rule all police conduct resulting from good faith mistakes of fact, the good faith exception will erode such key fourth amendment standards as "probable cause," "articulable suspicion," and "exigent circumstances," and will inevitably encourage a movement away from these traditional standards toward a test of general reasonableness in all fourth amendment situations.

A good faith mistake branch to the exception suggests that existing fourth amendment law fails to accommodate mistakes of fact. As discussed previously, however, the law does allow for police error in several ways.[333] For example, under current law, police action is judged from the standpoint of what the officer reasonably believed to be the facts at the time he acted.[334]

327. 622 F.2d at 844.

328. *See* notes 268-97 *supra* and accompanying text (discussing reasonableness and good faith of Markonni's conduct).

329. 622 F.2d at 846.

330. *Id.*

331. *See* note 229 *supra* (text of statute).

332. 622 F.2d at 846.

333. *See* notes 316-19 *supra* and accompanying text. We already have made this point in our discussion of the technical violation branch. This repetition is unavoidable, however, given the need to follow the structure of the court's opinion. That the same criticism applies to both branches of the court's exception is merely another indication of the invalidity of the *Williams* court's distinction between good faith mistakes and technical violations.

334. *See* notes 316-19 *supra* and accompanying text (discussing judicial standard for analyzing police conduct; citing cases).

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Thus, an arrest and incident search will be upheld if the police officer reasonably believed, on the basis of the facts as they appeared to him at the time, that he had probable cause to arrest and search, even though he discovers later that the suspect committed no offense.[335] Moreover, a stop will be sustained if grounded on reasonable, articulable suspicion, even though it turns out that there was nothing to be suspicious about,[336] and a warrantless entry of a house will be upheld if the police reasonably believed that exigent circumstances existed, even if upon entry they find that the suspect was not about to flee.[337]

Existing law also takes account of the legitimate interests of law enforcement officers in other ways. For example, the law recognizes that a policeman may be required to act quickly and, when so acting, should be given the benefit of the doubt as to the reasonableness of his actions.[338] An experienced officer may draw deductions from evidence that appears insignificant to a layman,[339] and an officer may rely on rumors, hearsay, the prior record of the suspect, and other evidence inadmissible at trial to support his determination of probable cause.[340] In addition, police action short of an arrest or full-blown search is permissible even when probable cause is lacking.[341] Finally, when the police act pursuant to a warrant, courts show greater deference to their factual judgments.[342]

Because the fourth amendment already accommodates an officer's factual mistakes,[343] the Fifth Circuit can only have meant one of two things if it intended to exempt from the exclusionary rule evidence that would be otherwise

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335. *See* note 316 *supra* (citing cases).

336. *See* note 319 *supra* (citing cases).

337. *See* Warden v. Hayden, 387 U.S. 294, 298 (1967) (officers' warrantless entry into house and search for suspect does not violate fourth amendment; exigencies of situation justified action). The Court has also held that exigent circumstances exist when the police have a reasonable belief that the evidence would be destroyed during the time it would take to get a warrant, and has permitted the police to search without a warrant in such circumstances. *See* note 130 *supra* (citing cases).

338. *See* Warden v. Hayden, 387 U.S. at 298-99 (police acted reasonably when they entered house in pursuit of armed robber; speed essential in such situation).

339. *See* United States v. Cortez, 449 U.S. 411, 418-19 (1981) (investigative stop of defendants does not violate fourth amendment; officers may gain legitimate basis for suspicion by utilizing objective facts which seem meaningless to untrained individual).

340. *See* Draper v. United States, 358 U.S. 307, 311 (1959) (officer may consider hearsay when determining probable cause); Brinegar v. United States, 338 U.S. 160, 172-73 (1949) (officer may consider prior police record of suspect when determining probable cause).

341. *See* note 118 *supra* (citing *Terry*).

342. *See* United States v. Ventresca, 380 U.S. 102, 106-07 (1965) (police action taken under warrant accorded preference; in marginal case, search under warrant may be sustainable when search without warrant would be held invalid).

343. One area where it is not clear that existing fourth amendment law accommodates reasonable, factual mistakes by the police is that of consent searches. In United States v. Matlock, 415 U.S. 164 (1964), the Supreme Court expressly left open the question whether a warrantless search was valid when the searching officers reasonably, but erroneously, believed that the consenting party had sufficient authority over the premises to authorize the search. *Id.* at 177 n.14. This issue is not an easy one. *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 58-64 (1974) (discussing complexities of consent to search dwelling by resident when search is directed against other resident). It should be resolved, however, by deciding if such a search is reasonable under the fourth amendment—whether the police should be required to seek a warrant "just to make sure"—not whether the evidence should be admitted under a good faith factual mistake exception to the exclusionary rule. It seems a pretty safe bet that the Court will eventually uphold such searches, as have other courts that have addressed the issue. *See* People v. Adams, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881 (1981) (evidence obtained in search based on good faith reliance on person's consent not suppressible upon discovery that person giving consent did not live on premises searched).

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admissible. It must have intended either that a test of general reasonableness should replace the specific benchmarks of probable cause, reasonable suspicion, and exigent circumstances, or, at the very least, that evidence obtained in a search incident to an arrest should be admissible as long as the officer reasonably believed he had probable cause for the arrest, even though he did not. Even this more limited reading of the *Williams* court's good faith exception translates into a fundamental change in fourth amendment standards.[344]

This result, although not explicit in *Williams*, seems to follow ineluctably from the opinion. If the court did not intend to introduce, at least to some extent, a concept of general reasonableness into fourth amendment law, its development and application of a good faith mistake branch makes little sense. Other evidence within the opinion itself also suggests that the *Williams* court believed Markonni's actions should be judged under a test of general reasonableness. In summarizing the agent's conduct, the court referred to the fact that Markonni knew Williams "was arriving from the very city from which she had obtained the heroin that caused her first conviction."[345] This fact may be relevant to Markonni's suspicion that Williams was engaged in drug trafficking, and may well have been an important factor in Markonni's decision to make the arrest,[346] but it is obviously irrelevant to Markonni's authority to arrest Williams for violating her travel restrictions. Thus, unless the court sought to evaluate Markonni's actions under a test of general reasonableness, this observation is irrelevant.

Although the court claimed that a good faith exception does not diminish the protections of the fourth amendment, other evidence suggests that it knew better. As the author of the article upon which the court relied for its definition of the exception candidly admitted in a portion of her article that the court understandably did not quote:

> The good faith doctrine should not be judged by its effect on the exclusionary rule but by its effect upon the standards which define when citizens will be protected against government intrusion. To the extent that probable cause is the key to fourth amendment protections, the good faith exception diminishes the liberality of the fourth amendment . . . . In other words what is required is no longer "probable cause" as presently defined, but instead a "reasonable ground for belief."[347]

Thus, both branches of the court's exception drastically affect fourth amendment law. A good faith exception for technical violations will stifle litigation that otherwise would identify such violations.[348] An exception for good faith

344. It marks a shift from requiring probable cause to sustain an arrest to requiring probable cause *or something close to it*.

345. 622 F.2d at 846.

346. *See* text accompanying notes 293-96 *supra* (discussing possibility that bail jumping grounds for arrest merely a pretext to search for drugs).

347. Ball, *supra* note 311, at 655-56.

348. It will also stifle litigation with respect to the reach of the fourth amendment itself. Just as reliance on a prior decision regarding probable cause or the warrant requirement will excuse the officer, so would reliance on a decision defining what constitutes a search or seizure. This would be a most unfortunate result. *See* note 178 *supra*.

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349. 622 F.2d at 846.

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351. *Id.*

352. *Id.* at 840.

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mistakes will erode the substantive standards of the fourth amendment, not merely affect the application of the exclusionary rule.

2. The Deterrence Justification

The *Williams* court's second justification for adopting the good faith exception was that the exclusionary rule should not be applied when an officer makes a good faith reasonable mistake of either fact or law. The court reasoned that, whatever the source of the officer's error, he acted in what he thought at the time was a legal manner.[349] The court argued, moreover, that applying the exclusionary rule in such a situation would " 'have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal.' "[350] Thus, any deterrent effect imposed by excluding the fruits of that error would be minimal and undesirable.

By adhering to this limited understanding of deterrence, the *Williams* court created a broad good faith exception to the exclusionary rule that shields all "reasonable" law enforcement mistakes under one of its two branches. The exclusionary rule, however, is not primarily a punitive device: it is a regulatory mechanism aimed at deterring police misconduct. Nevertheless, the *Williams* court adopted a retrospective view, and concluded that the exclusionary rule has no deterrent effect on good faith actions because an officer who acted in good faith cannot be deterred from that action by subsequently excluding its fruits.[351] The proper inquiry, however, is not whether the subsequent application of the exclusionary rule will deter a police officer who has acted in the good faith belief that he was right, but rather whether applying the exclusionary rule will reduce the number of fourth amendment violations in the future at an acceptable cost.

Because a police officer cannot be deterred from violating the Constitution unless he knows that his actions are in fact unconstitutional, future fourth amendment violations can only be deterred if courts examine police misconduct without regard to its good faith or consistency with existing standards. Although the *Williams* court indulged in the assumption that Markonni's conduct violated the fourth amendment,[352] it disposed of the case without deciding what precise violation he had committed. Indeed, the court's good faith exception practically guarantees that the violation never will be identified. Thus, as long as the limits of a DEA agent's authority to arrest for violations of bail conditions remain uncertain, law enforcement officers such as Markonni are left in welcome ignorance, free to make such "reasonable" mistakes in "good faith" forever. But if such arrests are unconstitutional, the good faith exception has failed to deter future fourth amendment violations by simply failing to identify the mistake itself.[353]

349. 622 F.2d at 846.
350. *Id.* at 842 (quoting 594 F.2d at 97-98 (Clark, J., dissenting))
351. *Id.*
352. *Id.* at 840.
353. A recent decision of the Kentucky Court of Appeals illustrates this crucial failing of the good faith exception. In Richmond v. Commonwealth, No. 80-CA-1366-MR (Ky. July 31, 1981) (copy on file at *Georgetown Law Journal*), the defendant challenged a district judge's authority to issue a search

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The application of the exclusionary rule, in contrast, would achieve this deterrence because under the rule the constitutionality of the police action, rather than its good faith or reasonableness, is dispositive of the suppression issue. Moreover, the cost of this deterrence is small. In the rare cases where an honest and conscientious police officer could not have known that a court would subsequently determine that his actions violated the fourth amendment, the decision would not apply retroactively.[354] Consequently, the exclusionary rule will require the suppression of evidence only in the case that announces an unforeseeable rule of law.

The good faith exception to the exclusionary rule, therefore, is not consistent with the *Williams* court's deterrence justification for the approach. The court's claim that the exception will admit evidence only "when no deterrence is called for and none can in fact be had"[355] is unconvincing; it forgets that even when the exclusionary rule fails to have a simple deterrent effect on a police officer's good faith conduct, it nevertheless identifies new constitutional violations and, as the earlier discussion of *Delaware v. Prouse* demonstrated, instructs all officers that this conduct is contrary to the fourth amendment and will not be condoned.

3. The Support of Precedent

The second *Williams* majority endeavored to justify its good faith exception not only as consistent with both the fourth amendment and the deterrence purpose of the exclusionary rule, but also as the natural outgrowth of precedent and scholarly authority.[356] Yet its use of authority is utterly unconvincing. The *Williams* good faith exception is, to begin with, inconsistent with a number of recent Supreme Court decisions.[357] Moreover, because the *Williams* approach determines admissibility without ruling on new constitutional standards and because it denies the litigant the potential benefit of a successful

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warrant outside the territorial limits of his district. He argued that the warrant was invalid because the judge could not act outside of his district, and that all evidence discovered during a search conducted pursuant to the warrant should be suppressed. *Id.*, slip op. at 3. The court conceded that "[w]e doubt the authority of a district judge, while outside the territorial limits of his district, to issue a warrant for the search of premises outside his district." *Id.* at 4. Nevertheless, the court ruled that despite the questionable validity of the warrant, the evidence was admissible at trial because the officers who conducted the search had "acted reasonably and in good faith." *Id.* at 9.

More importantly, the court was ready to assume a constitutional violation, yet refused to determine the constitutionality of the officers' conduct, reasoning that "[w]e find it unnecessary to decide that particular issue . . . because we believe the fruits of the search should not have been suppressed even though the magistrate may not have had authority to issue it." *Id.* at 4. Thus, like Agent Markonni, these officers remain in happy ignorance as to the legality of their conduct and are free to repeat their actions in the "good faith" belief that they are within the limits of the Constitution.

In this case, the good faith exception will fail to deter future fourth amendment violations because the court failed to identify the officers' mistake. In addition, by refusing to resolve the underlying constitutional issue, the court left the standards of the warrant requirement in doubt. Thus, *Richmond* illustrates how the good faith exception will retard the development of fourth amendment law, and encourage a general reasonableness standard for examining police misconduct.

354. *See* note 432 *infra* (discussing retroactivity).

355. 622 F.2d at 847.

356. *See id.* at 840-41 (both reason and authority support good faith exception and demand explicit recognition of implicitly supported exception).

357. *See* notes 422-39 *infra* and accompanying text (discussing recent Supreme Court cases in which evidence excluded although officers' beliefs seem reasonably justified by good faith compliance with statutes not yet invalidated).

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360. 622 F.2d at 843.

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362. 443 U.S. at 33.

363. *Id.*

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365. *Id.* at 33.

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367. *Id.* at 33.

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The *Williams* court conceived of its good faith exception as having two facets: technical violations and factual mistakes. It divided its discussion of authority accordingly. Although the court seems to have assigned precedent randomly to each facet, this discussion nevertheless follows the *Williams* format.

Technical Violations Facet. The *Williams* court relied principally upon *Michigan v. DeFillippo*[359] to support this branch of its good faith exception to the exclusionary rule.[360] Although the court suggested that the facts of the two cases are "closely analogous,"[361] there is little similarity between them. The Supreme Court in *DeFillippo* analyzed only the concept of probable cause; it did not consider the reach of the exclusionary rule as an independent issue. Thus, *DeFillippo* and *Williams* are entirely different cases and whatever support the *Williams* court purported to find in the prior decision of the Supreme Court was illusory.

In *DeFillippo*, Detroit police officers saw a man and a woman in an alley where the officers had gone to investigate the reported presence of two drunks.[362] As the officers approached, the woman was in the process of lowering her slacks.[363] Not surprisingly, one of the officers asked what the two were doing, and the woman responded that she was about to relieve herself.[364] The officers asked the man to identify himself, and DeFillippo gave obviously false, contradictory, and evasive answers.[365] The officers then arrested him for violating a Detroit ordinance that made it a misdemeanor for a person so stopped to refuse to properly identify himself.[366] A search incident to this arrest uncovered drugs in DeFillippo's pockets.[367] An intermediate Michigan appellate court held the ordinance unconstitutionally vague and ordered the evidence suppressed.[368]

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358. *See* notes 394 & 432 *infra* and accompanying text (traditionally litigant entitled to suppression in case determining new standards, but *Williams* neither gives litigant benefit nor requires court to articulate standards).

359. 443 U.S. 31 (1979).

360. 622 F.2d at 843.

361. Arguably the court was correct in this reading of the facts of the cases. *Compare* Michigan v. DeFillippo, 433 U.S. at 40 (search yielding drugs merely incident to arrest for obvious violation of ordinance) *with* United States v. Williams, 622 F.2d at 840 (search yielding drugs merely incident to arrest for obvious violation of court order).

362. 443 U.S. at 33.

363. *Id.*

364. *Id.* The Court concluded that this behavior, occurring at 10 p.m., warranted further police investigation. *Id.* at 37.

365. *Id.* at 33.

366. *Id.* at 34 (*citing* DETROIT, MICH., CODE § 39-1-52.3 (1976)).

367. *Id.* at 33.

368. People v. DeFillippo, 80 Mich. App. 197, 203, 262 N.W.2d 921, 924 (1977), *rev'd*, 443 U.S. 31 (1979). The appellate court expressly rejected the argument that good faith reliance on a presumptively valid ordinance renders the arrest legal. *Id.* at 200, 262 N.W.2d at 923. The Michigan Supreme Court denied further review. 443 U.S. at 35.

The *Williams* court's misreading of *DeFillippo*, a case involving the substantive scope of the fourth amendment, as a case involving only the application of the exclusionary rule, suggests an essential connection between the rule and the underlying right. *See* text accompanying notes 527-37 *infra* (char-

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The United States Supreme Court granted *certiorari* because of contrary Fifth Circuit holdings that an arrest under analogous circumstances did not violate the fourth amendment.[369] Because the officers had ample cause to conclude that DeFillippo had violated the ordinance, the only issue before the Court was whether the officers lacked probable cause within the meaning of the fourth amendment simply because the ordinance was later declared unconstitutional.[370] The Court held the arrest valid because probable cause depends on the facts and circumstances at the time of the arrest and does not dissolve upon the subsequent judicial declaration that an ordinance is unconstitutionally vague.[371] Therefore, the Court held that the evidence obtained incident to the arrest was admissible.[372]

Thus, *DeFillippo* declared no new exclusionary rule theory. Rather, it adhered to the traditional view that probable cause turns on whether the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."[373] In short, the *DeFillippo* Court withheld application of the fourth amendment exclusionary rule because it found that no fourth amendment violation had occurred.[374] It is a long step, however, from *DeFillippo* to the Fifth Circuit's position in *Williams* that whether or not a fourth amendment violation has occurred, the exclusionary sanction should not apply when the violation is a "good faith reasonable" one.[375] *DeFillippo* involved only rights; *Williams* purports to involve only remedies. Thus, contrary to the argument in *Williams*, *DeFillippo* did not imply a good faith exception to the exclusionary rule; it held, rather, that evidence need not be suppressed when no fourth amendment violation occurs.

The *DeFillippo* decision simply makes the point that an arrest that in some sense violates another constitutional provision—because the underlying criminal statute is invalid—does not, for that reason alone, also violate the fourth amendment. *DeFillippo* holds that the probable cause standard does not incorporate other constitutional protections. Thus, a successful constitutional challenge to an ordinance on grounds of vagueness does not automatically render an arrest under the ordinance a fourth amendment violation.[376] This point perhaps can be clarified with a hypothetical variation on *DeFillippo*.

Suppose an airport law enforcement officer saw DeFillippo distributing leaf-

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acterizing recent arguments of Chief Justice Burger and Judge Wilkey against exclusionary rule as attacks on the fourth amendment itself).

369. *Id.* at 35. The Court identified United States v. Carden, 529 F.2d 443 (5th Cir. 1976), and United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971), as Fifth Circuit cases holding that the fourth amendment does not require the suppression of evidence that is obtained incident to an arrest made pursuant to a presumptively valid ordinance. 443 U.S. at 35.

370. *Id.* at 37.

371. *Id.* The Court noted a possible exception when the ordinance is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 38.

372. *Id.* at 36.

373. *Id.* at 37.

374. *Id.* at 40.

375. *See* 622 F.2d at 840 (exclusionary rule exception applies when evidence discovered in actions "taken in good faith and in the reasonable, though mistaken, belief that they are authorized").

376. *See* 443 U.S. at 40 (unconstitutionally vague ordinance violates due process but does not undermine validity of arrest for violating ordinance).

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lets that described the sublime tranquility that could be attained by joining a local religious cult. The officer arrested DeFillippo and charged him with violating a recently enacted ordinance that purported to protect the susceptible from the influence of such cults.. The ordinance made it an offense to distribute any leaflets of this sort without advance approval of the Port Authority. The officer knew this leaflet had not been approved. In searching DeFillippo incident to the arrest, the officer discovered drugs.

In this hypothetical problem, should the court suppress the drugs on the ground that the ordinance violated DeFillippo's first amendment rights? Few would argue that the fourth amendment exclusionary rule should be pressed into service here, unless perhaps the officer knew that the ordinance would never pass constitutional muster[377] or that its enforcement was a mere pretext for a search.[378]

In our society, arresting DeFillippo for handing out pamphlets would be unlawful in one sense because he had broken no valid law. It is difficult to see, however, why that arrest, which was based on probable cause, or the search incident to it, would violate the fourth amendment.[379] Whatever values would be served by suppressing evidence in such a case would be largely distinct from those protected by the fourth amendment. Because other avenues for testing the ordinance's constitutional validity are readily available,[380] suppression of the evidence would be unnecessary. This is why not all arrests made pursuant to invalid laws violate the fourth amendment.

Had the *Williams* court been less eager to issue its sweeping mandate and more willing to decide the case before it, it could have relied on *DeFillippo* to conclude that the exclusionary rule should not apply; thus the court need not have based its decision on the novel theory that it rushed to cobble up, but instead could have admitted the evidence on the ground that Markonni's arrest, even if in some sense illegal, did not violate the fourth amendment. The court's rationale could have been that although the statutes did not authorize Markonni's warrantless arrest of Williams, the arrest nevertheless did not violate the fourth amendment because it was made in a public place on probable cause.[381] The plausibility of such a result depends on precisely what mistake the court assumes Markonni made. On the assumption that Markonni's only

377. *See* note 371 *supra* (*DeFillippo* court noted that some statutes might be so flagrantly unconstitutional that any reasonably prudent person would recognize their unconstitutionality).

378. *See* Michigan v. DeFillippo, 443 U.S. at 40-41 (Blackmun, J., concurring) (if defendant could show that police use ordinance as pretext for investigatory searches and arrests, it would rebut any claim of good faith reliance by officers).

379. The distinction between the arrest that we have hypothesized, which would in one sense violate the first but not the fourth amendment, can perhaps be sharpened by imagining a society where protections against unreasonable searches and seizures include a zealously enforced exclusionary rule but where religious expression is strictly regulated. In such a society, there obviously would be no reason to suppress evidence seized from DeFillippo because in that society his arrest and search would constitute perfectly acceptable law enforcement conduct. In our society, the arrest would be unlawful not because it was an unreasonable search and seizure, but rather because it would interfere with the free exercise of religion.

380. The most obvious method of challenging this hypothetical ordinance would be through a motion to dismiss on first amendment grounds.

381. *See, e.g.*, Michigan v. DeFillippo, 433 U.S. at 36 (warrantless arrest in public place constitutional if officer has probable cause); Adams v. Williams, 407 U.S. 143, 148-49 (1972) (same); Carroll v. United States, 267 U.S. 132, 155-56 (1924) (same).

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mistake was in thinking that contempt was an offense against the United States, this result would be acceptable. For even if a warrant is required to set in motion the contempt process or to revoke bond, the function of the warrant here is fundamentally different from the warrant requirement of the fourth amendment.[382] Had the *Williams* court relied on *DeFillippo* to conclude that no fourth amendment violation had occurred, however, the Fifth Circuit would not have had this occasion to create its good faith exception to the exclusionary rule.[383]

The other Supreme Court authority that the *Williams* court relied on to support the technical violation facet of the good faith exception is a retroactivity case, *United States v. Peltier*.[384] In that case, roving border patrol agents discovered marijuana during a warrantless search of Peltier's car seventy miles from the Mexican border.[385] At the time it was conducted, the search conformed to regulatory standards previously upheld by lower federal courts.[386] In the interval between the search and Peltier's trial, however, the Supreme Court in *Almeida-Sanchez v. United States*[387] struck down these standards as unreasonable. The *Peltier* Court declined to apply *Almeida-Sanchez* retroactively to invalidate the search.[388] It reasoned that the border patrol agent had acted "in good-faith compliance with then-prevailing constitutional norms"[389] and therefore that retroactive application of *Almeida-Sanchez* would not serve the purposes of the exclusionary rule.[390]

The *Williams* court's reliance on *Peltier* was misplaced. *Peltier* was a retroactivity case; *Williams* was not. By its very nature as a retroactivity case, *Peltier* was concerned with the applicability of a standard that the Supreme

382. In this instance the role of the warrant would be merely procedural. *Compare* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (search of customer present during execution of search warrant for premises violates fourth amendment, which protects people not places) *with* 622 F.2d at 837-38 (by analogy to Federal Rule of Criminal Procedure 42, warrant requirement for contempt "merely procedural").

383. This is not to say that the Court's decision in *DeFillippo* is without difficulties. It is worth noting that the Michigan statute was challenged below and held unconstitutional on both fourth amendment and due process grounds. *See* People v. DeFillippo, 80 Mich. App. 197, 201-203, 262 N.W.2d 921, 923-24 (1977) (ordinance void for lacking reasonable notice of what constitutes crime and for undercutting reasonable suspicion standard of *Terry*), *rev'd*, 443 U.S. 31 (1979). The Supreme Court, however, focused only on the unconstitutional vagueness of the statute and assiduously avoided addressing the independent fourth amendment issue. *See* 443 U.S. at 34 (Michigan interlocutory appeal held statute "unconstitutionally vague"). The Court overlooked the fact that there is a doctrinal affinity between the principles that an excessively vague statute violates due process and that an arrest without probable cause (or investigatory detention without articulable suspicion) violates the fourth amendment. Each of these rules seeks to limit police discretion; each seeks to curb capricious or discriminatory law enforcement by requiring relatively clear-cut standards for when the police may act. *Compare* Delaware v. Prouse, 440 U.S. 648, 663 (1978) (invalidating stops made for no articulable reason as encouraging unbridled police discretion) *with* Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 168 (1972) (invalidating statute for vagueness because gives unfettered discretion to police).

384. 422 U.S. 531 (1975).

385. *Id.* at 532-33.

386. *Id.* at 540.

387. 413 U.S. 266 (1973).

388. 422 U.S. at 542.

389. *Id.* at 536, 540.

390. *Id.* at 539, 542. The *Peltier* Court identified deterrence and judicial integrity as the purposes of the exclusionary rule. The Court concluded that applying *Almeida-Sanchez* retroactively would serve neither a deterrent purpose, because compliance with constitutional norms should be encouraged rather than deterred, nor the imperative of judicial integrity, because no willful disobedience was being condoned by the court. *Id.* at 536.

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Court had established before *Peltier* was decided. In *Williams*, there was no change in constitutional standards between arrest and trial. The standard for lawful arrest was, and still is, probable cause. If Markonni violated Williams' fourth amendment rights when he arrested her, he violated prevailing—albeit imperfectly articulated—constitutional norms.

An even more disturbing aspect of the *Williams* decision is that the court did not glean from *Peltier* the importance of articulating norms. Unlike the Supreme Court, the *Williams* court was content to leave the norms indefinitely inchoate.[391] It is only because of the first majority's opinion that we know Markonni's actions were, in the court's view, legal.[392] From the perspective of the second opinion, however, the first opinion is wholly unnecessary because the second majority requires only that Markonni have acted "in good faith and in reasonable though mistaken" belief that his actions were lawful.[393] Thus, the question whether Markonni's understanding of the law was indeed mistaken would remain unanswered, and the exclusionary rule would not apply to the fruits of his conduct. As argued in the previous section, unless the court determines the propriety of the conduct, future conduct of similar nature will necessarily be reasonable. Thus, the circle is complete, and Markonni and other law enforcement officers can go on indefinitely arresting for violations of conditions of release, in blissful but reasonable ignorance of what the law requires. Surely, this is not what the Supreme Court's decision in *Peltier* countenanced.[394]

Good Faith Mistake Facet. The scraps of authority that the *Williams* court ferreted out to support the good faith mistake facet of the exception provide even less sustenance than the authority it advanced to support the technical violation exception. The court relied primarily on the Supreme Court's

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391. 622 F.2d at 840 (error to suppress heroin regardless whether Williams' violation of bond condition was crime warranting arrest).

392. *Id.* at 839 (first majority opinion) (arrest for criminal contempt arising from breach of court order restricting travel valid therefore search incident to arrest proper).

393. *Id.* at 840 (second majority opinion).

394. *See* 422 U.S. at 535-39 (by implication) (whether to apply exclusionary rule retroactively presupposes courts will have new constitutional principles to apply).

In addition to Supreme Court opinions, the *Williams* court cited earlier Fifth Circuit opinions that similarly lend scant support for the exception. In United States v. Carden, 529 F.2d 443 (5th Cir. 1976), and United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971), the court did nothing more than anticipate Michigan v. DeFillippo, 443 U.S. 31 (1979). In each, the court stated that an arrest pursuant to a statute violative of due process did not necessarily violate the fourth amendment. *See* United States v. Carden, 529 F.2d at 445 (dictum) (arrest made in good faith reliance on statute not yet declared unconstitutional is valid regardless of statute's actual constitutionality); United States v. Kilgen, 445 F.2d at 289 (court's overturning conviction due to invalid statute does not automatically render previous arrest illegal).

The *Williams* court also relied on United States v. Hill, 500 F.2d 315 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975). In that case, however, the court was not at all concerned with the officer's good faith. It merely held that a formal error in the warrant application procedure that does not violate the fourth amendment need not lead to suppression. *Id.* at 322 (no fourth amendment violation when warrant issued on deficient affidavit but bolstered by sworn oral testimony in front of issuing magistrate). The *Williams* court's reliance on United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979), is similarly misplaced. That case did not even raise a fourth amendment issue. The court merely declined to extend the exclusionary rule to suppress evidence obtained in violation of the Posses Comitatus Act, 18 U.S.C. § 1385 (1976), which prohibits military involvement in civilian law enforcement. 594 F.2d at 85. Thus, even the Fifth Circuit precedent that the *Williams* court managed to muster fails to support the technical violation branch of the good faith exception.

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decision in *United States v. Janis*.[395] The central issue in *Janis* was whether to extend the exclusionary rule to a federal civil proceeding by or against the United States when the contested evidence was seized unlawfully by a state police officer.[396] This issue is completely irrelevant to *Williams*, which dealt with the admissibility at a federal criminal trial of evidence seized illegally by federal officials. Moreover, the Court's reasoning in *Janis* also lends no support to the good faith exception. The holding in *Janis* in no way turns on the good faith of the arresting officers, but solely on the Court's determination that any additional deterrent effect on state officials of extending the rule to federal civil proceedings was outweighed by the costs of suppression.[397] Finally, *Janis* does not support the good faith mistake facet of the exception because the officers' mistake in *Janis* involved reliance on a technically deficient warrant rather than a factual error.[398]

The *Williams* court also relied on *Michigan v. Tucker*,[399] which is probably best understood as yet another retroactivity case. Moreover, *Tucker* is not even a fourth amendment case; rather it is a fifth amendment case concerning derivative use of a tainted statement.[400] The *Tucker* Court reversed a state

395. 428 U.S. 433 (1976).

396. *Id.* at 434.

397. *Id.* at 454.

398. The warrant relied on was insufficient under Spinelli v. United States, 393 U.S. 410 (1969), which was decided three weeks before Janis' trial but after the search had taken place. United States v. Janis, 428 U.S. at 437. Although the Court has never decided whether *Spinelli* represented a break with prior law and should therefore be denied retroactive effect, this sequence of events in *Janis* may have played some part in the Court's decision. In his dissenting opinion in Desist v. United States, 394 U.S. 244 (1969), Justice Harlan used *Spinelli* as an example of a fourth amendment decision that would be given retroactive effect because it merely explicated the pre-existing probable cause standard. *Id.* at 263 (Harlan, J., dissenting).

399. 417 U.S. 433 (1974). *Tucker* and *Peltier* provided Justice Rehnquist with an opportunity to discuss his view of the exclusionary rule as a remedy with limited purposes. In his *Peltier* opinion, he cited both United States v. Calandra, 414 U.S. 338, 348 (1974) (exclusionary rule judicially created remedy to safeguard rights through deterrent effect rather than personal constitutional right of aggrieved; therefore application restricted to areas where remedial objectives best served), and Michigan v. Tucker, 417 U.S. 433, 447 (1974) (where official action pursued in complete good faith, deterrence rationale loses much of its force).

400. Michigan v. Tucker, 417 U.S. at 439. The relevance of *Tucker* to a fourth amendment case like *Williams* is questionable because *Tucker* proceeds from the premise that the *Miranda* requirement is a mere sub-constitutional judicial creation. *See id.* at 446 (police conduct departed from prophylactic standards but did not abridge rights). Fourth amendment standards, on the other hand, are constitutionally mandated, even if the fourth amendment exclusionary rule is not. *See* United States v. Peltier, 422 U.S. 531, 542 (1975) (fourth amendment does not require suppression under particular circumstances even if fourth amendment rights violated). Yet the Court itself has cited *Tucker* in the fourth amendment context. *See id.* at 539. *See generally* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 118, 120, 123 & n.131 (1978).

Surely both *Tucker* and *Peltier* provide much material from which the Court's more skillful domino players may yet, if they are inclined, reduce exclusionary rule protections. *Cf.* Amsterdam, *supra* note 88, at 351 (skillful domino players have prescient purpose in moves they make, such as explanatory statement in one opinion as basis for extension in different situation). The Supreme Court, however, has not followed the most extreme implications of either opinion. Indeed, as discussed in text below, the Court's actions may repudiate some of those implications, particularly in cases where the police relied on statutes expressly authorizing unconstitutional searches or seizures. *See, e.g.*, Payton v. New York, 445 U.S. 573, 574, 600 (1980) (statute authorizing warrantless entry into suspect's home for routine felony arrest does not outweigh constitutional standard of reasonableness); Ybarra v. Illinois, 444 U.S. 85, 95-96 (1979) (statute authorizing detention and search of person present when officers executing search warrant for premises does not outweigh long prevailing constitutional standard of probable cause).

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401. 417 U.S. at 435, 4
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404. 384 U.S. at 476.
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411. *Id.* at 90, 96.
412. *Id.* at 96 n.11.
413. *Id.*

court decision[401] suppressing evidence that the police had discovered by following a lead which Tucker inadvertently provided during an interrogation not meeting the standards subsequently pronounced in *Miranda v. Arizona*.[402] As in *Peltier*, when the Court decided *Tucker* it had already articulated the constitutional standards to govern future police conduct.[403] Of course, in *Miranda*, when the Court first promulgated those standards, it excluded the evidence.[404] As noted above, the *Williams* court would decline both to articulate the controlling constitutional standards and to apply the exclusionary rule. Finally, the mistake in *Tucker* was, as in *Janis*, legal rather than factual. Thus, *Tucker* provides no support for the factual mistake branch of the court's exception.

Precedent Ignored. Not only did the *Williams* court cite cases that fail to support the good faith exception, but, more importantly, it largely ignored recent Supreme Court decisions with which it is irreconcilable. *Ybarra v. Illinois*,[405] the one case that the *Williams* court tried to distinguish, provides a good example.

Ventura Ybarra was patronizing the Aurora Tap Tavern when the police arrived to execute a search warrant for the tavern and its bartender.[406] Upon entering the tavern, the officers announced their purpose and proceeded to frisk each of the patrons for weapons under the authority of an Illinois statute.[407] During this search, the officers discovered heroin in Ybarra's pants pocket.[408] The Court held that none of the facts supporting the warrant, and nothing learned while executing it, gave the officers probable cause to arrest or search Ybarra.[409] Despite the statute, the Court held the search unconstitutional,[410] and reversed Ybarra's conviction because the drugs should have been suppressed.[411] The Court distinguished *DeFillippo* on the ground that, unlike the statute in *Ybarra*, the statute in *DeFillippo* did not purport to allow searches without probable cause.[412] Indeed, it did not purport to authorize searches at all but only to create a new substantive offense. Thus, all searches under the *Ybarra* statute violated the fourth amendment, whereas only some searches under the *DeFillippo* statute did.[413] The *Williams* court utterly ig-

401. 417 U.S. at 435, 447-50.
402. 384 U.S. 436 (1966).
403. The Court noted that the officers in *Tucker*, acting before these standards were announced in *Miranda*, were "guided, quite rightly, by the principles established in *Escobedo v. Illinois*, 378 U.S. 478 (1964)." 417 U.S. at 447.
404. 384 U.S. at 476.
405. 444 U.S. 85 (1979).
406. *Id.* at 88-89.
407. *Id.* The statute authorized law enforcement officers to detain and search any person found on premises being searched pursuant to a warrant to protect the officers from attack and prevent the disposal or concealment of anything described in the warrant. *Id.* at 87.
408. *Id.* at 89.
409. *Id.* at 90-92. The Court also rejected the argument that the search was proper either under *Terry* or under an extension of *Terry*. *Id.* at 92-96.
410. *Id.* at 96 n.11. The Court stated: "This state law, therefore, falls within the category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches." *Id.*
411. *Id.* at 90, 96.
412. *Id.* at 96 n.11.
413. *Id.*

nored this obvious distinction in its rush to shield from the exclusionary sanction all unconstitutionally seized evidence that is the fruit of "reasonable good faith" police action.[414]

The *Williams* court, however, did endeavor to explain *Ybarra*: "Exclusion of evidence seized without any probable cause is an entirely different question from suppression of evidence seized upon a good-faith and reasonable belief in the existence of probable cause."[415] Applying the *Williams* court's rationale, however, the officers in *Ybarra* would have been excused under the good faith exception. The Illinois legislature told them that their frisks were proper, and no authority had since ruled otherwise. Their conduct seemed to fit perfectly into the Fifth Circuit's exception to the exclusionary rule for technical violations committed when an officer "rel[ies] upon a statute which is later ruled unconstitutional."[416]

Alternatively, the officers in *Ybarra* might reasonably have thought that probable cause was not required because the Supreme Court has approved several types of intrusions in which officers lack probable cause.[417] The search in *Ybarra*, however, did not sufficiently resemble any of these intrusions.[418] If a relevant distinction exists between these different types of fourth amendment violations—searches conducted in the mistaken belief that probable cause was present[419] and searches conducted in the mistaken belief that probable cause was not necessary[420]—the *Williams* court failed to articulate it.[421]

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414. *See* 622 F.2d at 847 (when conduct taken in reasonable, good faith belief that it was proper, court shall not apply exclusionary rule).

415. *Id.* at 846.

416. 622 F.2d at 841 (quoting Ball, *supra* note 311, at 638-39).

417. *See, e.g.*, Michigan v. Summers, 101 S. Ct. 2587, 2595 (1981) (decided after *Ybarra* and *Williams*) (approved detention of homeowner without probable cause during execution of valid warrant to search home for contraband); Pennsylvania v. Mimms, 434 U.S. 106, 109-11 (1977) (per curiam) (approved order to traffic offender to exit lawfully stopped car though no probable cause or articulable suspicion); United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (approved brief roving border patrol vehicle stops near border and interrogation of occupants on reasonable articulable suspicion of illegal aliens although no probable cause); Terry v. Ohio, 392 U.S. 1, 30 (1968) (approved protective stop and frisk for weapons on reasonable articulable suspicion although no probable cause).

418. *Compare* Ybarra v. Illinois, 444 U.S. 85, 91-96 (1979) (detaining and searching customer merely present on searched premises unlawful because no probable cause, despite prevailing statutory authority) *with* Pennsylvania v. Mimms, 434 U.S. 106, 109-11 (1977) (per curiam) (ordering traffic offender out of lawfully stopped car lawful without probable cause) *and* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (dictum) (briefly stopping car in border area lawful on articulable suspicion without probable cause) *and* Terry v. Ohio, 392 U.S. 1, 30 (stopping suspect and frisking for weapons lawful without probable cause as long as carefully limited and based on articulable suspicion).

419. *See* Johnson v. United States, 333 U.S. 10, 13 (1948) (mistaken belief that opium odor outside hotel room of unknown occupant constituted probable cause to search); United States v. Di Re, 332 U.S. 581, 587 (1947) (mistaken belief that defendant's mere presence in suspected car constituted probable cause).

420. *See* Torres v. Puerto Rico, 442 U.S. 465, 472 (1979) (mistaken belief that no probable cause necessary because airport search "functional equivalent" of border search); Dunaway v. New York, 442 U.S. 200, 216 (1979) (mistaken belief that no probable cause necessary because custodial questioning lesser intrusion than normal arrest); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (mistaken belief that no probable cause necessary for spot check of motorist's license and registration).

421. Although several Supreme Court decisions express doubts about the efficacy of the exclusionary rule, they would not support the *Williams* outcome because none of the decisions permit evidence obtained in violation of prevailing fourth amendment standards to be used directly in the government's case-in-chief. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 484-86 (1976) (exclusionary rule not extended to federal habeas corpus claim by prisoner previously afforded full and fair consideration of fourth amendment claim because minimal value for judicial integrity or deterrence); United States v. Janis, 428 U.S. 433, 454 (1976) (exclusionary rule not extended to federal civil proceeding because insufficient

Moreover, in a broad range of decisions, the Supreme Court has expanded the contours of fourth amendment protections in ways that would be unforeseeable to even the most prescient police officers. For example, in *Chimel v. California*,[422] the Court held that a search incident to an arrest in a residence is unreasonable if it extends beyond the immediate reach of the arrestee.[423] In *Katz v. United States*,[424] the Court held that eavesdropping or wiretapping constitutes a search even if it does not involve a physical trespass.[425] In *Delaware v. Prouse*,[426] the Court held that random traffic stops constitute unreasonable fourth amendment intrusions.[427] In *Payton v. New York*,[428] the Court held that unless there are exigent circumstances officers must secure a warrant before they may enter a person's home to arrest her.[429] In *Steagald v. United States*,[430] decided after *Williams*, the Supreme Court extended *Payton* to require a search warrant before officers may enter the home of a third party to make an arrest pursuant to a warrant.[431]

Although to one degree or another these decisions may have been prefigured by earlier opinions, they were sufficiently unforeseeable that the officers who searched Chimel's home, entered to arrest Payton and Steagald, eavesdropped on Katz, or stopped Prouse, all would pass a test of reasonable, good faith conduct. This consideration is one of the factors that has led the Court to apply such decisions only prospectively.[432] In keeping with traditional practice, however, the Court has not paused to consider whether to withhold the

likelihood of deterrence); United States v. Calandra, 414 U.S. 338, 354 (1974) (exclusionary rule not extended to grand jury proceeding because insufficient incremental deterrence).

422. 395 U.S. 752 (1969).

423. *Id.* at 768 (overruling United States v. Rabinowitz, 339 U.S. 56 (1950), and Harris v. United States, 331 U.S. 145 (1947)).

424. 389 U.S. 347 (1967).

425. *Id.* at 353 (overruling Goldman v. United States, 316 U.S. 129 (1942), and Olmstead v. United States, 277 U.S. 438 (1928)).

426. 440 U.S. 648 (1979).

427. *Id.* at 663 (case of first impression).

428. 445 U.S. 573 (1980).

429. *Id.* at 574 (denying permissibility of entry into suspect's home to make warrantless arrest as expressly left open in United States v. Watson, 423 U.S. 411, 418 n.6 (1976)).

430. 101 S. Ct. 1642 (1981).

431. *Id.* at 1644.

432. The Supreme Court has ruled that three factors are to be considered in deciding whether a decision establishing a "new" rule of law should be given retroactive effect: (1) the purpose of the new standards; (2) the extent of reliance upon old standards by law enforcement authorities; and (3) the effect of retroactive application on the administration of justice. Stovall v. Denno, 338 U.S. 293, 297 (1967). This approach was first formulated in Linkletter v. Walker, 381 U.S. 618 (1965), where the issue was whether *Mapp v. Ohio*, extending the exclusionary rule to the states, should be given retroactive effect. *Mapp* did not, of course, create "new" fourth amendment law, but simply required the states to provide a specific remedy for conduct that had been unconstitutional since *Wolf v. Colorado*. Nevertheless, the Court denied retroactive effect to *Mapp*. As the Court assessed the three factors: (1) the primary purpose of the exclusionary rule, deterrence of police misconduct, would not be advanced by making the rule retroactive, and "the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late," *id.* at 637, (2) the states had reasonably relied on prior law in failing to enforce the fourth amendment through the exclusionary sanction, and (3) retroactive application would: "tax the administration of justice to the utmost," because:

> Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory [sic] will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

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benefits of the exclusionary rule from the defendants in these cases on the theory that the searches were conducted in reasonable good faith. Yet, the *Williams* court would withhold the benefit of the exclusionary rule to the defendant without either announcing the new law or clarifying the old. Thus, its approach is wholly inconsistent with the principles upon which the Supreme Court has traditionally resolved fourth amendment issues.

Even more strikingly, the *Williams* court ignored *Whitely v. Warden*,[433] in which the Supreme Court suppressed evidence despite the undisputed good faith of the arresting officers.[434] In *Whitely*, the arresting officers received a radio bulletin that a warrant was out for the defendants' arrest.[435] The officers had no reason to know that the affidavit underlying the warrant was insufficient.[436] Based on the radio bulletin, the officers arrested the defendants and uncovered stolen property[437] during a subsequent search of their car.[438] Although the conduct of the arresting officers was unquestionably in good faith, the Supreme Court ordered the evidence suppressed, holding that the arrest and search violated the defendants' fourth amendment rights.[439] Although the *Williams* court did not say whose good faith was at issue, it implied that the relevant inquiry is into the good faith of the arresting officer.[440] If this is true,

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Id. at 437-38.

This analytical approach was then extended in Desist v. United States, 394 U.S. 224 (1969), where the issue was whether *Katz v. United States*, a decision extending substantive fourth amendment protections, should be given retroactive effect. It is now the test not only for "new" fourth amendment decisions, but for constitutional decisions in other areas of criminal procedure. *See* Stovall v. Denno, 388 U.S. 293, 299-301 (1967) (Court declines to apply decisions in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), retroactively).

When the retroactivity of a "new" fourth amendment decision is at issue, the first factor will always cut strongly—indeed, it appears, decisively—against retroactive application. Because in the Court's view the only purpose of the exclusionary rule is to deter, there is no point in applying it retroactively to police conduct that has already occurred, and which was permissible under prior law. The second factor, whether relevant officials reasonably relied on prior law, turns on the degree to which the "new" decision represents a break with prior law. Normally, the relevant officials are the police, and the Court has been generous in finding that reliance was reasonable. In United States v. Peltier, 422 U.S. 531, 542 (1975), for example, the Court held that Almeida-Sanchez v. United States, 413 U.S. 266 (1973), was non-retroactive even though it did not constitute, at least to the dissenters, a "sharp break" with the past. *See* 422 U.S. at 548 (Brennan, J., with Marshall, J., dissenting) (*Peltier* good illustration of dangers of addressing prospectivity when "sharp break" standard not met). *See also* Desist v. United States, 394 U.S. 244, 276-77 (1969) (Fortas, J., dissenting) (in refusing to apply *Katz v. United States* retroactively, Court rewards police who unreasonably relied on clearly discredited doctrine of *Olmstead v. United States*, and penalizes police departments that follow developing case law). The lower courts, too, have been quick to find reasonable reliance on prior law. *See* 3 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 11.5, at 696 n.58 (citing cases). Finally, the third factor, which since *Linkletter* seems to have become something of a make-weight, also has invariably counted against retroactive application of fourth amendment decisions because applying such decisions retroactively is a "difficult and time-consuming task." Desist v. United States, 394 U.S. at 251. In addition, of course, application of the exclusionary rule has no bearing on guilt or innocence. Thus, the short of it is that the Supreme Court has denied retroactive effect to every one of its fourth amendment decisions that even arguably established a "new" rule of law.

433. 401 U.S. 560 (1971).

434. *Id.* at 569.

435. *Id.* at 563.

436. *Id.* at 568.

437. *Id.* at 563.

438. *Id.*

439. *Id.* at 568-69.

440. *See* 622 F.2d at 840, 846-47 (referring to "officers in the course of actions' . . . taken in good faith" and later referring to "conduct" without specifying whose, but concluding that arresting Agent Markonni acted in good faith).

owever, *Williams* is totally inconsistent with *Whitely*. *Williams* would insu- ate an arresting officer whenever an independent third party obtained a warrant.[441]

The *Williams* court's marshaling of secondary material to support the good faith exception is equally unpersuasive. The principal scholarly support for the second *Williams* opinion is Edna F. Ball's article on the "reasonable" exception to the exclusionary rule.[442] Professor Ball argues for an exception to the exclusionary rule by analogizing to a series of nineteenth-century admiralty cases contributing to the development of the concept of probable cause. She notes that in these cases of seizure and prize and suits for malicious prosecution the defendant could usually assert a good faith reasonable mistake as at least a partial defense.[443] From this, she argues that a similar defense should be available to suppression of evidence motions because fourth amendment claims also involve probable cause questions.[444]

Professor Ball's article contains some interesting material, but her central argument is unsound.[445] First, in most of the tort cases that she discusses, the defendant who prevailed on a good faith reasonable mistake defense was not entirely vindicated. In seizure and prize cases, for example, he could escape punitive damages, but would still be liable for actual damages.[446] Thus, a more appropriate analogy to these early civil cases lies in the present Supreme Court law of suppression. The police officer who arrests without probable cause will lose the immediate fruits of his misconduct, but derivative fruits, evidence obtained only as an indirect result of his misconduct, may be admissible if he acted in good faith.[447]

More importantly, the fact that the law of suppression and the law of prize and capture share the concept of probable cause does not imply any further similarity. Professor Ball might just as well argue that because suppression

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441. *But cf.* Whitely v. Warden, 401 U.S. at 568 (otherwise illegal arrest cannot be insulated from challenge by instigator's decision to rely on fellow officers to arrest). In fact, as far back as 1959, the Supreme Court expressly rejected the argument that the good faith of the arresting officer can substitute for probable cause. *See* Henry v. United States, 361 U.S. 98, 102 (1959) ("good faith on the part of arresting officers is not enough"). In the words of Justice Stewart in Beck v. Ohio, 379 U.S. 89 (1964), "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Id.* at 97 (warrantless public arrest and incident search unlawful because uncorroborated tip insufficient to constitute probable cause). If subjective good faith need only be "reasonable" for evidence to survive suppression, then all that insulates us from the unbridled police discretion that Justice Stewart foresaw is an ad hoc, virtually standardless, judicial review of "reasonableness."

442. Ball, *supra* note 311.

443. *See id.* at 639–40 (good faith total defense to malicious prosecution and partial defense against punitive damages in seizure and prize).

444. *Id.* at 639.

445. She is guilty of what an old logic textbook deemed "false analogy" and "a copious source of error." G. JOYCE, PRINCIPLES OF LOGIC 285 (3d ed. 1926). "Few things carry conviction to the mind so much as a striking analogy, and few things can be more misleading." *Id.*

446. Ball, *supra* note 311, at 639.

447. *See* United States v. Ceccolini, 435 U.S. 268, 279 (1979) (testimony of witness admissible because sufficient attenuation between illegal search and finding witness); *cf.* Dunaway v. New York, 442 U.S. 200, 216 (1979) (confession inadmissible because no intervening events between illegal detention and confession); Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (confession inadmissible because state failed to show attenuation between illegal arrest and confession). Although the Court uses a multifactor analysis to determine attenuation, the flagrancy of the official misconduct is of particular importance. 422 U.S. at 603-04.

issues as well as prize and capture cases involve concepts of probable cause, both ought to be heard in admiralty. Or she might also argue that courts should adopt another doctrine from the law of prize and capture for the law of the fourth amendment. In old admiralty cases, a seizure of a vessel was held justified with or without probable cause if, after the fact, the vessel turned out to be subject to seizure.[448] Fourth amendment law, however, has always been otherwise; an unlawful search cannot be made lawful by what it turns up.[449] The incorporation of this admiralty rule into the fourth amendment would do away with the suppression doctrine altogether: If the search were fruitless, no evidence would be found to suppress; if it were successful, no fourth amendment violation would be found no matter how glaring the absence of probable cause.[450]

The court also relied on a short piece by Professor Charles Alan Wright,[451] which he first delivered as a lecture to undergraduates.[452] Wright's same basic arguments for a watered-down exclusionary rule have been discussed extensively elsewhere and will not be repeated here.[453] In any event, the *Williams*

448. The admiralty cases that Ball relies on involved seizures of ships that it turned out were not subject to forfeiture. Probable cause was set up as a defense by the captain of the capturing ship. When the seized ship was subject to capture, that was the end of the matter. The capturing ship was liable only if the seized ship was not subject to forfeiture *and* there was no probable cause to believe that it was. *See* Slocum v. Mayberry, 15 U.S. 1, 9-10, 2 Wheat. 1, 5 (1817); The Charming Betsy, 6 U.S. 64, 120-22, 2 Cranch 34, 68-70 (1804). The seizure, in other words, could be justified by its results.

Justice Rehnquist and Chief Justice Burger have also suggested that the Court may have gone wrong in Byars v. United States, 273 U.S. 28 (1927), when it rejected the doctrine that a search is justified by what it turns up and held that probable cause could only be measured by objective facts known to the officer prior to the search. *Id.* at 29. "This result," Justice Rehnquist has written, "while taken for granted today, was not inevitable. The Court certainly could have held that discovery of the article sought is compelling evidence that the search was justified, or that any violation of the Fourth Amendment in such a case was harmless error." California v. Minjares, 443 U.S. 916, 921 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay). This doctrine, to use Professor Amsterdam's terminology, presupposes a purely "atomistic," rather than "regulatory" interpretation of the fourth amendment. *See* note 88 *supra*.

449. United States v. Di Re, 332 U.S. 581, 595 (1947); Byars v. United States, 273 U.S. 28, 29 (1927).

450. Professor Ball anticipated such objections and attempted a rejoinder. But it is only a rephrasing of her basic argument, with all of its weaknesses intact:

> One may well ask why the teaching of early civil cases is relevant to the development of modern rules of criminal procedure . . . . Putting aside the conceptual overlap of tort and crime, perhaps the best answer is that the nineteenth century civil cases dealing with unintentional mistake concerning probable cause gave early courts their only opportunities to consider the definition of probable cause and the effect that good faith would have on the implementation of that doctrine. Since the Court has been willing to use these decisions to define probable cause in later criminal cases, it is not inappropriate to look to them for guidance in the area of good faith as well.

Ball, *supra* note 311, at 641 (footnotes omitted). The overlap to which Professor Ball refers is not as great as she suggests. The similarity is between the elements of torts and the elements of crimes. The only similarity that would help Professor Ball's argument would be one between torts and the suppression doctrine. The analogy between these two areas, however, is in fact quite weak. That Professor Ball's article persuaded the *Williams* court demonstrates how eager it was to adopt the good faith exception.

451. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

452. *Id.* at 736.

453. *See generally* Geller, *supra* note 70, at 656-84.

Professor Wright asserted that empirical evidence failed to establish the prophylactic efficacy of the exclusionary rule; Wright, *supra* note 452, at 739; that much police activity is not even aimed at securing convictions and therefore cannot be reached by the rule; *id.* at 740; that the police rarely learn whether the evidence they seized was excluded or admitted, or why; *id.*; and that police in fact do not

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court both misinterpreted Wright's argument and failed to evaluate his cost-benefit analysis. Wright did not argue for the reasonable good-faith exception embraced by *Williams*. Instead, he favored the American Law Institute (ALI) proposal.[454] This proposal would apply the exclusionary remedy only when there has been a substantial fourth amendment violation.[455]

A more substantive criticism is that Wright misperceived the costs associated with the exclusionary rule, costs that he deemed so excessive as to require a major cut back of the rule.[456] According to Professor Wright, in addition to freeing an assortment of gamblers, junkies, and gun-toters, the rule has freed these heinous criminals of Supreme Court infamy: the child-murderer Coolidge;[457] the brutal rapists, Davis[458] and Bumper;[459] DeForte, a Teamsters official who used his position to extort payments;[460] and Berger, who conspired to bribe a high public official.[461]

Although Professor Wright acknowledged that the suppression of evidence does not always result in the unleashing of a criminal who preys again, he asserted that:

> In most or all of the cases the evidence held to have been obtained illegally was so critical to the prosecution's case that it is unlikely that [the defendants] could be convicted without it. The probable result is that the defendants in these cases, who have been found guilty of heinous crimes, will go free.[462]

Had he checked, Professor Wright would have learned that his assumptions were wrong. Of this group, all three violent offenders were convicted, on remand, without the suppressed evidence.[463] Only DeForte and Berger escaped

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understand the arcane fourth amendment standards that the courts set for their conduct. *Id.* at 740-41. For a discussion of the similar arguments of Professor Oaks, see text accompanying notes 147-60 *supra*.

454. Wright, *supra* note 452, at 745.

455. The ALI test of a substantial violation focuses on: (1) the seriousness of the violation; (2) the effect on the criminal justice system as a whole; and (3) the prejudicial effect to the particular defendant. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3, Commentary 407 (Apr. 15, 1975 Proposed Official Draft). *See generally* Coe, *ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 7 n.22 (1975); Wright, *supra* note 452, at 745.

456. *See* Wright, *supra* note 452, at 742 (rule not justified without evidence that benefit to society outweighs obvious cost of freeing heinous criminals).

457. *Id.* (citing Coolidge v. New Hampshire, 403 U.S. 443, 494 (1971) (Black, J., concurring and dissenting) (kidnapping fourteen-year-old, slashed throat, shot in head, and left on side of road)).

458. *Id.* (citing Davis v. Mississippi, 394 U.S. 721, 722 (1969) (rape in victim's home)).

459. *Id.* (citing Bumper v. North Carolina, 391 U.S. 543, 558-59 (1968) (Black, J., dissenting) (twice raped woman at gunpoint, shot her and companion, and left them for dead)).

460. *Id.* (citing Mancusi v. De Forte, 392 U.S. 364, 365 (1968) (union official convicted of extortion)).

461. *Id.* (citing Berger v. New York, 388 U.S. 41, 44 (1967) (bribed Chairman of New York State Liquor Authority)).

462. *Id.*

463. *See* Davis v. State, 255 So. 2d 916, 919, 922 (Miss. 1971) (second conviction on rape upheld with victim's purged testimony read at trial), *cert. denied*, 409 U.S. 855 (1972); North Carolina v. Bumper, 5 N.C. App. 528, 532, 536 (1969) (rape charge not retried but convicted on assault and robbery); note 465 *infra* (Coolidge agreed to plea bargain instead of facing new trial).

Wright was especially reckless in saying that the exclusionary rule would be likely to free Davis. The evidence suppressed was a set of fingerprints taken from Davis during an illegal arrest. Davis v. Mississippi, 394 U.S. 721, 724-25 (1969). Justice Stewart suggested in dissent that the suppression was a useless act. *Id.* at 730 (Stewart, J., dissenting). There was probable cause to rearrest Davis because the victim subsequently identified him as her assailant. *Id.* Another set of fingerprints could be properly obtained, so conviction at retrial was a foregone conclusion. *Id.* The majority did not contest this point. On retrial, properly obtained fingerprints were admitted and Davis was convicted. Davis v.

further punishment.[464] Coolidge and Davis are both still behind bars.[465] Bumper served a substantial portion of his sentence and was granted parole just last year.[466]

As its final secondary source, the *Williams* court cited Judge Friendly's book, *Benchmarks*.[467] Yet, it did so with a simple, conclusory statement indicating that Judge Friendly favored the good faith exception,[468] and overlooking the narrowness of his rationale.[469] Judge Friendly assumes that the exclusionary rule operates only through a crude mode of specific deterrence, punishing the particular offending officer directly to teach him to do better the next time.[470] Judge Friendly's argument, however, ignores the other deterrent mechanisms of the rule discussed earlier in this article.[471] This cursory representation of support from Judge Friendly is misleading,[472] and is indicative of the flimsy authority that the *Williams* court offered for its decison. Thus, the ten judges who filed a special concurrence were surely correct in criticizing their brethren for " 'reach[ing] out' for a vehicle to change a long line of precedent."[473]

State, 225 So. 2d 916, 921 (Miss. 1971) (affirming conviction after retrial). It is surprising that Professor Wright, writing in 1972, missed all this.

464. *See* People v. Berger, 18 N.Y.2d 638, 638 (1966) (government stipulated that without evidence and leads from eavesdropping devices it would have no case), *rev'd on other grounds*, 388 U.S. 41 (1967). There is no reported case indicating that DeForte was ever retried.

465. Telephone conversations with *Coolidge* prosecutor, William Maynard (July, 1981) and *Davis* prosecutor, George Warner (July, 1981).

466. Telephone conversation with *Bumper* prosecutor, Herbert Pierce (July, 1981).

467. 622 F.2d at 841 (citing H. FRIENDLY, BENCHMARKS 260-62 (1967)).

468. *Id.* at 841 (referring to Friendly as writer "advocating exception").

469. *See id.* (Friendly suggested limiting suppression to fruit of intentionally or flagrantly illegal activity).

470. *See* H. FRIENDLY, BENCHMARKS 260 (1967) ("deter" suggests analogy to criminal law which punishes evil motives rather than mistaken ones; experiencing punishment is the only method of deterrence).

471. *See* notes 146-75 *supra* and accompanying text (rule also deters through general and systemic deterrence).

472. Equally significant is the secondary material that the *Williams* court does not consider. A limitation on the exclusionary rule somewhat similar to *Williams*' "reasonable, good-faith mistake" exception has been proposed before. As mentioned above, the American Law Institute Model Code of Pre-Arraignment Procedure proposed eliminating all but "substantial" breaches from the reach of the rules. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 8.02, Note 1 (Tent. Draft No. 3, 1970) (advocating use of exclusionary rule for seizures violating basic safeguards but not for non-prejudicial minor violations). In fact, the drafters considered but rejected a proposal virtually identical to the *Williams* holding. *See* Coe, *supra* note 455, at 7 (flexible "prejudice test" excluding unlawfully obtained statements and identifications rejected as ambiguous when ALI adopted substantiality test for search and seizure section). A similar test to that contained in the ALI proposal provision has been enacted in North Carolina. *See* N.C. GEN. STAT. § 15A-974(2) (1973) (suppression of evidence obtained as result of "substantial violation" determined by considering interest violated, extent of deviation from lawful conduct, willfulness, and deterrence). The literature concerning these various proposals is already vast; yet the *Williams* court, although undertaking a major refashioning of the exclusionary rule, altogether ignored it. This is not to suggest that the authors of law journal articles are entitled to see their works cited whenever a court later issues a decision involving the same topic. The debate on these questions, however, has been substantial, and the *Williams* court could have profited by exploring the literature more fully.

473. 622 F.2d at 848 (Rubin, J., with Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate & Thomas A. Clark, JJ., specially concurring) (quoting Crist v. Cline, 434 U.S. 981, 981 (1977) (Marshall, J., dissenting from order restoring case to calendar for oral argument)).

V. THE GOOD FAITH EXCEPTION IN PRACTICE

This article has examined both the fourth amendment exclusionary rule and the sweeping good faith exception announced by the Fifth Circuit in *United States v. Williams*. It has demonstrated the effectiveness of the rule as a deterrent to police misconduct, and has argued that a good faith exception will substantially undermine that effectiveness. In order to highlight the crucial flaws of the *Williams* approach, this section first describes the mischievous effects the exception will have on lawmaking in both trial and appellate courts. It then examines some typical fourth amendment violations that under the exclusionary rule lead to suppression of illegally-obtained evidence. By comparing the result of these violations under present law with the anticipated result under a good faith exception, the section demonstrates that any gain in successful prosecutions brought about by the application of the exception would be far outweighed by the consequent loss of constitutionally protected privacy.

A. THE GOOD FAITH EXCEPTION IN THE COURTS

1. The Hearing

Williams tells us next to nothing about how a trial court applying the exception should conduct hearings on motions to suppress. While the *Williams* court strained to promulgate its good faith exception in the broadest possible language, it was remarkably reticent in instructing the lower courts how to implement it. Specifically, the decision leaves open three crucial issues: what standards to use in assessing good faith or reasonableness; who will have the burden of proof; and what evidence will be admissible.

First, it is not clear what constitutes good faith or reasonableness in this context. One might suppose that by good faith mistake the court meant an honest mistake, not a sham mistake, but that is of little help. The only enlightenment the court gives as to what constitutes a reasonable mistake is that the officer's belief in the lawfulness of his action must be "based upon articulable premises sufficient to cause a reasonable and reasonably trained, officer to believe that he was acting lawfully."[474]

Second, the court left "for another day" the "proper allocation of the burden of proof."[475] As a consequence, once the defendant shows misconduct, we do not know whether the defendant must also prove bad faith and unreasonableness, or whether the burden shifts to the government to establish that the conduct was in good faith and reasonable.

This confusion raises a third problem. Whatever burden of proof is imposed, the government will present the officer's self-serving claim that he thought his actions were lawful.[476] To refute this assertion, the defendant will

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[474] Even this limited guidance seems to have been given as something of an afterthought. 622 F.2d at 841 n.4a.

[475] *Id.* at 847.

[476] Of course, police perjury may impede accurate finding of fact by the trial court. *See* P. MURPHY, POLICE POWER 187-88 (1969) (empirical study showing significant rise in percentage of false arrest reports in which evidence seized through "abandonment" after *Mapp v. Ohio*; report alleges that decision encouraged police to file false reports); J. SKOLNICK, JUSTICE WITHOUT TRIAL 214-[illegible] (because judicial decisions have failed to set clear standards, police often reconstruct events to

have to contest the officer's state of mind,[477] thus posing thorny evidentiary problems. It would seem, for example, that a primary focus of the hearing will necessarily be the officer's training. This highlights an anomaly of the good faith exception: proof by the defense that the offending officer was well-trained tends to disprove the officer's claim of good faith by showing that he knew better, while proof by the government that the officer was poorly-trained tends to prove the officer's good faith by showing that he did the best he could. Thus, police departments may have an incentive to leave their officers ignorant of the legal standards governing their conduct because an officer's claim of good faith is more credible if he has no reason to know that his conduct is unlawful.[478] This anomaly has the concomitant negative effects of both punishing police departments that efficiently regulate their officers by holding these officers to a higher standard, and rewarding inept departments by holding their officers to a lower standard.

While the good faith exception's objective requirement of reasonableness will admittedly mitigate these effects to some degree, the incentives introduced by the subjective requirement of good faith remain skewed. Moreover, the reasonableness requirement of the good faith exception raises additional problems of proof. By hypothesis, the exception comes into play only when the exclusionary rule would otherwise require suppression. Thus, however "reasonable" the officer's conduct, it is nonetheless unconstitutional. At some point, something has gone wrong either in the officer's judgment or in his training. The defendant thus must try to establish bad faith, by showing that the officer had sufficient training to know that his actions were unlawful, or unreasonableness, by showing the inadequacy of the officer's training. In either case, *Williams* leaves unresolved whether the defendant will be allowed to call as witnesses the police brass in charge of training and continuing education of line officers. If he is permitted to call these witnesses, then present suppression hearings, which opponents of the exclusionary rule criticize for consuming precious court time,[479] will seem positively fleeting by comparison to those born of the good faith exception. If the defendant is precluded from calling these witnesses, however, how can he make the necessary "expedition

"fabricat[e] probable cause"); Oaks, *supra* note 103, at 739-42 (increased police fabrication of probable cause in response to *Mapp*); Note, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87, 94-95 (1968) (empirical study demonstrating rise in abandonment claims by police supports conclusion that police have fabricated basis of arrest to meet requirements of *Mapp*).

477. This is, perhaps, one desirable feature of a good faith exception: it would conceivably require police officers to explain in court their understanding of the relevant fourth amendment law and why they felt that their actions were justified under it. This in turn might provide an added incentive for police departments to educate their officers in the law. In practice, however, it is unlikely that trial courts will conduct hearings on motions to suppress like a law school course in criminal procedure. In the end, the officer's bald assertion that he thought he had the right to do what he did will, if unchallenged, establish good faith. Moreover, the exclusionary rule without a good faith exception already provides police departments with the incentive to teach their officers the bounds of constitutionally permissible conduct.

478. *See* Kaplan, *supra* note 131, at 1044 (police department dedicated to crime control would have incentive to leave its officers uneducated about law so that constitutional violations could be labeled inadvertent).

479. *See* note 533 *infra* (citing critics of time spent on suppression motions).

into the mind of the police officers"[480] to prove bad faith or unreasonableness under *Williams*?

In practice, few trial courts will permit time-consuming inquiries into the training and motivations of individual police officers. The good faith exception gives trial courts a convenient method by which to side-step these questions, as well as the underlying fourth amendment issue itself, by simply excusing the officer's alleged mistakes as reasonable ones. Inevitably, a sliding scale test of general reasonableness will become the touchstone of the fourth amendment.

Indeed, the good faith exception, coupled with the operation of other forces, works to ensure this outcome. To begin with, the good faith exception's factual mistake facet is intelligible only as a test of general reasonableness,[481] and its technical violations facet will stem the development of fourth amendment doctrine.[482] What rules we now have will slowly atrophy, and new ones will not be generated to take their place. Moreover, trial judges are averse to suppressing probative evidence, and an excuse of general reasonableness provides a virtually unreviewable way to avoid doing so. We can expect, then, to find judges' thumbs on the reasonableness side of any sliding scale.[483] Even a judge sensitive to fourth amendment interests will find himself in difficult straits, for as Professor Amsterdam has observed, the difficulty with a reasonableness test is that "it converts the fourth amendment into one immense Rorschach blot. . . . The varieties of police behavior and the occasions that call it forth are so innumerable that their reflections in a general sliding scale approach could only produce more slide than scale."[484] In practice, he concludes, "appellate courts defer to trial courts, and trial courts defer to the police."[485] Thus, "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."[486]

2. The Appeal

For the most part, trial courts simply apply the law within the bounds set by appellate courts. Appellate courts, however, both correct errors of law and develop the law. As a result, the consequences of the good faith exception are even more profound at the appellate level because courts that adopt the exception will not develop fourth amendment law. If evidence is admissible under the good faith exception, appellate decisions that resolve the fourth amend-

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480 Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., with Harlan & Stewart, JJ., dissenting from dismissal of certiorari) (inquiry into minds of officers would produce grave and fruitless misallocation of judicial resources).

481 *See* text accompanying note 326 *supra*.

482 *See* text accompanying note 344 *supra*.

483 "So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute an open invitation to nullification at the trial court level." Kaplan, *supra* note 131, at 1045.

484 Amsterdam, *supra* note 88, at 393-94. Moreover, "[i]t is always easier to convince jurors that a police illegal action was inadvertent than it is to convince them it was purposeful." Kaplan, *supra* note 131, at 1045 n.93 (citing R. KEETON, TRIAL TACTICS AND METHODS 291-92 (2d ed. 1973)).

485 Amsterdam, *supra* note 88, at 394.

486 Beck v. Ohio, 379 U.S. 89, 97 (1964), *quoted in* Amsterdam, *supra* note 88, at 394.

ment issue would be superfluous. To be sure, in some instances under the good faith exception, a court will have to consider what present law required of an officer in order to determine whether his behavior was reasonable.[487] Nevertheless, the issue under the good faith exception is how far the officer's conduct exceeded the limits of existing law. Thus, there would be no occasion to re-examine the limits themselves in the course of determining the officer's reasonableness.[488]

Moreover, the judicial policy against rendering advisory opinions ensures that courts will not examine police conduct held permissible under prior decisions or authorized by statutes because such actions undoubtedly would constitute good faith reasonable conduct. Appellate courts will not issue advisory opinions; the Supreme Court warned against such unnecessary adjudication in *Bowen v. United States*.[489] In *Bowen*, the Ninth Circuit had refused to apply *Almeida-Sanchez v. United States*[490] retroactively.[491] Before deciding the retroactivity issue, however, the Ninth Circuit concluded that the search was illegal. Affirming the decision that *Almeida-Sanchez* should not be applied retroactively, the Supreme Court nevertheless warned:

> This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive . . . . This practice is rooted in our reluctance to decide constitutional questions unnecessarily . . . . Because this reluctance is in turn grounded in the constitutional role of the federal courts . . . the district courts and courts of appeal should follow our practice, when issues of both retroactivity and application of constitutional doctrine are raised, of deciding the retroactivity issue first.[492]

Bowen suggests a similar approach in good faith exception cases. The good faith exception would allow appellate courts to decide that a police officer's reasonable reliance on prior law obviated the need to reach the constitutional question, because the exclusionary rule would not apply in any event. Thus, applying the rationale of *Bowen*, federal courts adopting a good faith exception would not promulgate decisions addressing the fourth amendment

487. One commentator has asserted that the good faith exception does not preclude examination of the constitutionality of the officers' conduct. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1415 (1977). Under this analysis, appellate courts or the Supreme Court could require trial courts to address fourth amendment issues directly before they evaluate possible good faith exception arguments. *Id.* It is hard to believe that the availability of the good faith exception will result in searching reviews of fourth amendment law, even when courts are required to resolve fourth amendment issues directly before considering good faith exception claims. The good faith exception's implicit message to trial courts and litigants that reasonable fourth amendment violations are permissible means that only the most egregious police conduct would receive close scrutiny under traditional fourth amendment standards, conduct that would have failed the good faith exception standard anyway.

488. The *Williams* court, for example, decided that Agent Markonni had not transgressed the limits of the law enough to merit any discussion of these limits at all.

489. 422 U.S. 916 (1975).

490. 413 U.S. 266 (1973).

491. United States v. Bowen, 500 F.2d 960, 967 (9th Cir. 1974) (search illegal because conducted without warrant or probable cause 49 miles from border; outside scope of *Almeida-Sanchez* permissible border searches), *aff'd on other grounds*, 422 U.S. 916 (1975).

492. 422 U.S. at 920 (citations omitted).

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There are, then, several reasons for believing that the good faith exception will stem the development of fourth amendment law. First, there will be far fewer challenges to arguably illegal searches and seizures. If courts are quick to apply the good faith exception, litigants, recognizing that evidence in their cases will not be suppressed, will stop raising fourth amendment issues. Even if courts ignore or distinguish *Bowen* and issue purely prospective decisions delimiting future permissible police conduct, there will nonetheless be a drop-off in the number of fourth amendment challenges. Defendants want to win their cases, not advance abstract points of law that may benefit others.[494] Thus, regardless of the merits of a defendant's constitutional claim, he will have no incentive to challenge prior decisions if he anticipates that the evidence will be admitted under the good faith exception.[495] Judicial sensitivity

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493. In *Bowen*, the petitioner had been the subject of a routine search at a fixed traffic check point some distance from the Mexican border. Evidence leading to a criminal prosecution was uncovered in the course of the search. Bowen's motion to suppress was denied by the trial court, and the Ninth Circuit affirmed that decision. United States v. Bowen, 462 F.2d 347, 348 (9th Cir. 1972) (per curiam). The Supreme Court granted *certiorari*, but vacated and remanded the case for consideration in light of its decision in *Almeida-Sanchez v. United States*, which held that non-probable cause searches conducted by roving border patrols were unconstitutional. Bowen v. United States, 413 U.S. 915, 916 (1973). On remand, Bowen asked the Ninth Circuit to extend the reasoning of *Almeida-Sanchez* to invalidate fixed check point searches as well. United States v. Bowen, 500 F.2d 960, 962 (9th Cir. 1974) (en banc). The Ninth Circuit agreed that *Almeida-Sanchez* governed such searches, but ruled that it should not be applied retroactively, and therefore upheld the admission of the evidence against Bowen. *Id.*

The Supreme Court again granted *certiorari*. Before the Court, Bowen made the imaginative argument that because his case involved an extension, not merely an application, of *Almeida-Sanchez*, the newly announced law should have been applied in his case even if *Almeida-Sanchez* was non-retroactive. Bowen v. United States, 422 U.S. 916, 919-20 (1975). He argued that he was entitled to exclusion under the Court's uniform practice of "applying new constitutional doctrine in the case that establishes the point." *Id.* at 920. The Court rejected this argument, and noted that the Ninth Circuit should not even have decided Bowen's constitutional claims. *Id.*

It is true that in the *Bowen* situation, another case testing the constitutionality of fixed point searches would, doubtless, eventually arise if the Border Patrol continued to conduct such searches. As it turned out, the Court decided such a case on the very same day as *Bowen*, declaring that a fixed point search that occurred after *Almeida-Sanchez* was unconstitutional. United States v. Ortiz, 422 U.S. 891, 896-97 (1975). Thus, the Supreme Court's directive in *Bowen* that courts decide whether a particular decision should be given retroactive effect before addressing a novel constitutional claim building on that decision, does not tend to foreclose ultimate resolution of the novel claim in the way that the good faith exception does. Consequently, the Court could rule that even when misconduct would be excused under the good faith exception, the fourth amendment question should be resolved in an advisory opinion. There is nothing in *Bowen*, however, to suggest that the Court would reach such a result. Moreover, even in the *Bowen* situation, by ruling as it did, the Court might have permitted a highly intrusive and, as it turned out, unconstitutional practice to continue for the indefinite future. Indeed, the irony is that the more unreasonable it was in terms of fruitfulness, the longer it was likely to continue.

494. The argument may be made that advances in fourth amendment law will come through the litigative strategies of institutional defenders, such as public defender services. This is unlikely for several reasons. First, any single new development in fourth amendment law is likely to require the litigation of a large number of cases that present that issue. This would far exceed the pool of cases available to any one attorney or office. Second, public defenders are notoriously overworked and do not have time to plan the development of fourth amendment law or to litigate every marginal case raising a key point of law in the hope of ultimately changing the law. Third, personnel changes and turn-over would make the execution of any such strategy difficult at best. Finally, changes in fourth amendment law do not have the kind of effect on the professional life of defense lawyers that, for example, liberalized discovery rules have.

495. One commentator has noted that:

> [I]f parties anticipate such a [purely prospective decision] they will have no stimulus to argue for change in the law. Indeed, the recognition of even a substantial possibility of such limita-

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to this chilling effect is, of course, the primary reason why decisions that are not given retroactive effect are applied to the litigants whose cases have spawned them.[496] Nevertheless, the very purpose of the technical violations facet of the good faith exception is to ensure that evidence is not suppressed when there has been reliance on prior law. Thus, when a good faith exception is operative, a defendant whose argument for suppression would require the court to overrule, modify, or even merely clarify existing law would have little or no chance for success.

Second, in the cases that do come up, courts will not decide the fourth amendment issue frequently enough to advance fourth amendment law very significantly over time.[497] The good faith exception rests on the premise that fourth amendment violations are acceptable if reasonable. Under this rationale, the courts will categorize only egregious police conduct as violative of the fourth amendment. Courts will most readily find good faith exceptions in close cases, those from which advances in fourth amendment law now come. If the conduct is so close to the line that a judge cannot confidently characterize it as proper or improper, the good faith exception allows the judge to conclude that an officer should not be required to do so either. Thus, we will have few meaningful new decisions refining fourth amendment law.

Third, the good faith exception will have a stultifying effect on the develop-

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tion will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases. Under such circumstances issues involving renovation of unsound or outmoded legal doctrines will either not be presented for judicial decision or—what may be even more troublesome—if reached by the courts, may be decided upon inadequate argument and consideration.

Mishkin, *Forward: The High Court, The Great Writ, and the Due Process of Law and Time*, 79 HARV. L. REV. 56, 61 (1965).

496. In Stovall v. Denno, 388 U.S. 293 (1967), the Supreme Court refused to apply to one case a rule of law established in two similar cases that the Court decided the same day. Distinguishing between *Stovall*, a habeas corpus collateral challenge, and the two other cases, direct appeals, the Court called *Stovall* a "vehicle" for deciding whether there would be retroactive application of the two direct appeals. *Id.* at 294. Rejecting retroactivity, the Court said:

> We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

Id. at 301.

497. It is essential for an appellate court to receive many cases in order to clarify a particular area of the law. Otherwise, "the bits or slices or splinters which are cast up may be too fragmentary to yield a proper picture or to allow the shaping and joining of complementary hubs and spokes and rims to form a doctrinal wheel." K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 263 (1960). With a continuing set of cases, "the court will see more, learn more from the series; the court will begin to see in the round rather than the flat, and to gain some understanding of the whole in action." *Id.* This may seem to suggest praise for the disease because of the virtues of the remedy applied to it—that repeated fourth amendment violations are desirable because of the exclusionary rule case law that they generate. The problem of police lawlessness, however, is more a condition than a disease, and the ongoing interpretation of the fourth amendment a perpetual societal necessity.

ment of fourth amendment law, as courts adopting it fail to set standards for future police conduct. The second majority opinion in *Williams* itself demonstrates that courts are likely to find good faith exceptions without examining or defining the limits of the law.[498] Under the *Williams* analysis, another officer might well be able to arrest and search a suspect for bond-jumping without fearing suppression of the evidence he obtains. Only after courts discuss the limits of the law will officers be barred from claiming good faith if they engage in the same conduct in another case.

Further, the incentive to develop fourth amendment law under the good faith exception will rest primarily with the government. Every victory for the government in the courtroom will widen the boundaries of lawful police conduct. Since the determination of the fourth amendment issue will not help the defendant who raises it, it will be uneconomical for him to devote already limited resources to contesting this issue. Thus, the fourth amendment argument would be severely lopsided: the government devoting substantial resources, the defendant, comparatively few. Like a ratchet, the law will move in only one direction.[499]

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498. *See* note 353 *supra* (discussing *Richmond v. Commonwealth* and effects of adopting good faith exception).

499. One commentator has recently argued that the good faith exception would have just the opposite effect. He contends that such an exception would would lead courts to interpret the fourth amendment more liberally, that is, as imposing tighter restrictions on the police. Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DEPAUL L. REV. 51 (1980). Bernardi cogently criticizes a series of recent Supreme Court decisions that he suggests have unduly restricted fourth amendment protections. These cases, he argues, might well have been decided differently had there been a good faith exception to the exclusionary rule. Bernardi describes, for example, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), where the Court held that waiver of the right to refuse consent to a search must be knowingly made, as being a case where "the Court has charted a course restricting individuals' protections under the fourth amendment for the sake of avoiding the exclusionary rule." Bernardi, *supra*, at 93. The idea seems to be that if the Court could avoid suppressing evidence when police misconduct has been undertaken in good faith, it would be prepared to pronounce stricter fourth amendment standards.

It is conceivable that if there were no exclusionary rule at all, the Court would be prepared to issue grand, hortatory, liberal, fourth amendment rulings. The only problem is, of course, that without the rule there would be no occasion to issue these rulings, and no effective sanction to enforce them. It makes no sense at all to argue that with a good faith exception the courts would make more liberal fourth amendment law. To begin with, it is clear that the Supreme Court decided *Schneckloth*, and the other cases Bernardi discusses, because it approved what the police had done and not because it simply wanted to avoid suppressing evidence. As the Court said in *Schneckloth*, "where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." 412 U.S. at 227. The Court did not decline to require the police to inform citizens of their right to refuse consent because it feared it would have to suppress evidence where the police bungled, but rather because it felt it would be "impractical" to impose such a requirement. *Id.* at 231.

Moreover, the good faith exception would not, in fact, enable the courts to avoid applying the exclusionary rule in situations such as *Schneckloth*. Once the Court held, as Bernardi suggests it would have, that the police must obtain a knowing as well as voluntary waiver for a consent to search, it would not thereafter be a reasonable good faith mistake to neglect to do so, and evidence would be suppressed. The only effect of the good faith exception would have been to permit the Supreme Court to rule that knowing consent must henceforth be demonstrated, while at the same time allowing Bustamonte's fraud conviction to stand because the police there could not reasonably have known what was expected of them. Bernardi's argument, then, requires us to believe that the Court declined to render a correct constitutional ruling of great importance because it could not bear to free Robert Bustamonte on his bad check charge. Even the Court's harshest critics do not think it quite that short sighted. Finally, Bernardi overlooks that under a good faith exception cases like *Schneckloth* might well not be litigated at all, and so the Court would not have the opportunity to make the liberal fourth amendment law that Bernardi favors.

B. THE GOOD FAITH EXCEPTION AND THE FOURTH AMENDMENT

The good faith exception, then, will promote a general reasonableness standard for fourth amendment violations and stem the development of fourth amendment law. This will itself increase the number of fourth amendment violations that could be prevented if the courts stayed in the business of identifying the lines that separate lawful from unlawful searches and seizures. The good faith exception will affect police conduct in other ways as well. Most fundamentally, as they perceive that courts are often ready to excuse their violations of constitutional norms, the norms themselves will lose the symbolic significance we want the police to attach to them. As the police come to know these norms as only inconsistently binding on them, the educative and moral force of the norms will be weakened. Yet modern deterrence theory emphasizes the importance of this often overlooked educative function of law.[500] The good faith exception will also have more direct effects on police conduct. This section examines three typical situations in which the exclusionary rule currently applies, and in which a good faith exception may produce a different result.

1. Searches and Seizures Conducted Without Probable Cause

Under existing law, probable cause is the basic requirement for most searches and seizures. The fruits of a search or seizure that was illegal because made without probable cause are suppressed. This is the most straightforward kind of suppression case, and perhaps also the most common. Conceivably, a court adopting a good faith exception would decide that because reasonableness is already built into the concept of probable cause, the exception simply does not apply in this case; the court might rule that a "reasonable" belief that probable cause was present, when it was not, is a logical impossibility because probable cause means "reasonable grounds for belief." Thus, to recognize the possibility of a "reasonable mistake" as to probable cause would be to acknowledge the possibility of an officer acting out of a "reasonable unreasonable belief."

The *Williams* decision, however, suggests no such limitation on its holding. Indeed, the court relied on Professor Ball's article, which argued for a weakened exclusionary rule principally in order to dilute the concept of probable cause.[501] Thus, it seems likely, although not inevitable, that the good faith exception will apply in this sort of case.

How, then, will the *Williams* decison affect these searches? The most obvious and baleful consequence will be to retard, if not halt altogether, the development of standards for assessing probable cause. This article has discussed how the courts, in implementing the exclusionary rule, have been able to set tolerably clear lines for the police to observe in determining the presence of probable cause in many recurring factual patterns.[502] Yet it takes close

500. *See generally* F. ZIMRING & G. HAWKINS, *supra* note 138.

501. *See* Ball, *supra* note 311, at 656 (requirements of good faith exception replace requirement of probable cause as determinitive test for admissibility of evidence).

502. *See* notes 185-94 *supra* and accompanying text (discussing District of Columbia Court of Appeals decisions).

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503. *See* notes 197-200

cases—those in which a court could say that an officer's conduct was "reasonable" even if it was illegal—for the line to be identified. Consequently, this important law development process will likely come to a halt.

The benefit in protection of fourth amendment values reaped from appellate decisions in cases like those mentioned above would clearly seem to outweigh the social cost of the few prosecutions that were lost. Moreover, even when a court has denied a motion to suppress and held the evidence admissible, the court may have further clarified probable cause standards in the process.[503] Thus, on the balance of values inherent in the probable cause standard, suppression of evidence is entirely justified when police conduct violates the fourth amendment.

It also stands to reason that a police officer will himself be less exacting when making assessments of probable cause if he knows that his conduct will later be measured against a tolerant standard that allows for "reasonable good faith mistakes." The rational officer, after *Williams*, will search in the doubtful case, where before *Williams*, he would likely have stayed his hand. In Professor Ball's view, this is precisely the point. Moreover, the simultaneous weakening of the exclusionary rule's general deterrent impact, and the undermining of its usefulness in the law development process will combine to reduce the rule's potential for preventing fourth amendment violations. As noted above, the officer will be motivated to search in the doubtful case. At the same time, this doubtful case will remain doubtful indefinitely, since the courts will lack the steady flow of cases that require them to sharpen the bounds of permissible police conduct.

2. Warrantless Arrests and Searches

A second sort of fourth amendment violation occurs when the police fail to obtain a warrant when one is required. This article has suggested that the efficiency of the exclusionary rule is potentially great in this situation. If the police know that by failing to obtain a warrant, they will risk suppression of the evidence, they will obtain a warrant in doubtful cases. They will still be able to obtain the evidence they seek, and they can minimize the risk that a judge will later order it suppressed. Consequently, the exclusionary rule serves its purpose, although very little evidence is in fact excluded. Extending the hope that the trial judge will later excuse a failure to obtain the necessary warrant as a "good faith reasonable mistake" can only encourage the police to proceed without a warrant when they are unsure whether they need one or not. Thus, searches will occur in the absence of probable cause, although the magistrate, had he been consulted, could have told the police that they simply could not search, at least without first continuing their investigation by other means. This in turn will increase the number of innocent victims of ultimately fruitless police intrusions. Further, without a steady diet of close cases on the scope of the warrant requirement, the bounds of that standard will remain unclear.

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503. *See* notes 197-200 *supra* and accompanying text (discussing *Dorman v. United States*).

3. Searches Pursuant to an Invalid Warrant

Finally, there are those cases when a defendant seeks to attack a magistrate's finding of probable cause upon which a warrant was issued. Although the *Williams* court expressly reserved the question whether its new rule would apply here, the logic of the decision can leave little doubt that it would be applicable.[504] Indeed, the proponents of legislation enacting a similar limitation on the exclusionary rule have cited this situation as a principal justification for their proposals. Yet the principal concern of the drafters of the fourth amendment was to prohibit issuance of warrants without probable cause.[505] The anomaly of excluding the exclusionary rule in precisely those situations where the fourth amendment violation is clearest seems to have escaped attention. The view that the exclusionary rule is pointless here is tragically short-sighted. Courts rarely suppress evidence by overruling a magistrate's finding of probable cause. There are, for example, no recent decisions from the District of Columbia Court of Appeals, or the United States Court of Appeals for the District of Columbia Circuit, holding a warrant insufficient.[506] The reason surely is an effective system for the issuance of warrants that can, in no small measure, be attributed to the exclusionary rule. The magistrate is surely more careful because he knows that his probable cause determinations may be reviewed on a motion to suppress. Further, he has standards to consult only because the appellate courts have decided enough cases, including some important ones involving review of affidavits in support of warrant applications, to provide guidance. The police, moreover, have less incentive to engage in "magistrate-shopping," in an effort to present their warrant applications to the most lenient magistrate available. At the same time, the exclusionary rule presents the legislature with the incentive to finance a system of professional magistrates, capable of accurate probable cause determinations.[507]

Those few cases where courts have suppressed evidence on the ground that a magistrate issued a warrant in the absence of probable cause have, by and large, served the important purpose of clarifying the law of probable cause. The cases that immediately spring to mind are *Aguilar v. Texas*[508] and *Spinelli v. United States*,[509] which, more than any others, have safeguarded the magis-

504. *See* notes 323-25 *supra* and accompanying text (discussing applicability of *Williams* to cases where officers obtain warrant).

505. *See* note 43 *supra* (discussing intent of drafters of fourth amendment).

506. This article leaves aside those cases in which the affiant has made a knowing or reckless mistatement of a material fact in his warrant application. *See* Franks v. Delaware, 438 U.S. 154, 158 (1978) (affidavit supporting probable cause contained statement of witness never interviewed by police; misstatements not inadvertent, but in bad faith).

507. There is some evidence that in some jurisdictions the police do shop around for lenient magistrates. *See* 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 4.2(e), at 39 (may be reason to be concerned about practice of "magistrate-shopping") (citing L. TIFFANY, D. MCINTYRE & D. ROTTENBERG, DETECTION OF CRIME 120 (1965)). If their decisons were not reviewable by a motion to suppress, those magistrates sympathetic to the police might well become more generous still. Professor Johnson has suggested that in the federal system, at least, the exclusionary rule should not apply when the police have acted pursuant to a warrant. Johnson, New Approaches to Enforcing the Fourth Amendment 8-9 (working paper), *cited in* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 1.2 (Supp. 1981). It may well be, however, that the federal magistrates perform as well as they do because the exclusionary sanction, although rarely applied, is an ever-present possibility.

508. 378 U.S. 108 (1964).

509. 393 U.S. 410 (1969).

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trate's independent role[510] by ruling that warrants issued principally on an affiant's conclusory allegations are insufficient.[511] The Court has insisted that the affiant present sufficient underlying circumstances so that the magistrate can undertake his own assessment of probable cause.[512]

It would, therefore, be particularly wrong-headed to repeal the exclusionary rule in this area, especially since existing doctrine already requires deference to the magistrate's finding of probable cause. It appears that the exclusionary rule, at little actual cost in lost evidence, is the mainspring of an effective warrant issuance system.

This list of typical fourth amendment violations could be extended. Nevertheless, the point should be clear: The good faith exception would significantly undermine a reasonably well-functioning process for protection of fourth amendment rights. Advocates of the exception, by and large, err in considering only the specific deterrent impact of the exclusionary rule. They ignore the other processes by which the exclusionary rule, in several important ways, promotes our right "to be secure in [our] persons, houses, papers, and effects, against unreasonable searches and seizures."

VI. THE GOOD FAITH EXCEPTION AND THE ATTACK ON THE FOURTH AMENDMENT

This article has demonstrated that the good faith exception, although ostensibly directed only at the exclusionary rule, would operate to dilute substantive fourth amendment rights. The *Williams* opinion reveals that this result may be intentional. The court did not condemn the exclusionary rule because it is an ineffective deterrent, but rather because it commands strict compliance with constitutional standards that the court viewed to be incompatible with effective law enforcement.[513] The court made this sentiment clear by quoting Judge Clark's dissent to the panel decision:

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510. *See* Aguilar v. Texas, 378 U.S. at 111 (court must insist that magistrate perform neutral and detached function).

511. *See* Spinelli v. United States, 393 U.S. at 416 (no probable cause when affiant offered no support for belief that informant reliable).

512. *See* Aguilar v. Texas, 378 U.S. at 114 (magistrate must be informed of: (1) underlying circumstances indicating personal knowledge of informant, and (2) underlying circumstances indicating reliability of informant).

513. *See* United States v. Williams, 622 F.2d 830, 842 (5th Cir. 1980) (en banc) (second majority opinion) (exclusionary rule directly prevents "whole truth" from being told, thereby freeing guilty criminals and endangering society), *cert. denied*, 449 U.S. 1127 (1981).

The approach of the *Williams* court poignantly calls to mind the contrary perspective adopted by Justice Jackson in his dissent in Harris v. United States, 331 U.S. 145 (1947). Confronted with a case implicating the competing concerns of law enforcement efficiency and the preservation of constitutional safeguards, Justice Jackson wrote:

> [The fourth amendment], like each of our constitutional guarantees [sic], often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught.

Id. at 198 (Jackson, J., dissenting). Justice Jackson, however, was no friend of the exclusionary rule in its application to the states. *See* Irvine v. California, 347 U.S. 128, 136 (1954) (plurality opinion per Jackson, J.) ("[t]hat the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police")

> If today's ruling does serve as any sort of deterrent, it may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. If he hesitates to act lest he later be criticized for denying to the process of justice evidence of crime, we have hindered, not furthered, the interests of justice.[514]

We have thus traveled some distance from where we were a decade ago. At that time, the debate centered on whether the benefit of the exclusionary rule—the deterrence of police illegality—justified its costs to society—the suppression of evidence and the consequent loss of convictions. Critics of the rule urged its abrogation because it had little evident effect on police behavior.[515] Now, critics demand elimination of the rule precisely because it has succeeded in restraining unlawful police conduct.[516]

Chief Justice Burger's evolving position on the exclusionary rule traces this shift in criticism. In his 1971 dissent in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[517] his first salvo against the rule while sitting on the Supreme Court, the Chief Justice questioned whether the exclusionary rule actually deterred police misconduct. He acknowledged the need to ensure "official observance of the law,"[518] but insisted that "[s]ome clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals."[519] Such a demonstration, he argued, had not been made.[520] Even so, Burger did not call for jettisoning the rule all at once. He feared that eliminating the exclusionary rule, without an effective tort remedy to replace it, would engender "the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared."[521] Accordingly, he urged Congress to create tort remedies directly against the government and to overrule the exclusionary rule through legislation.[522]

Six years later, in the absence of any legislative response to his invitation,

514. United States v. Williams, 622 F.2d 830, 842 (1980) (en banc) (second majority opinion) (quoting United States v. Williams, 594 F.2d 86, 97-98 (5th Cir. 1979) (Clark, J., dissenting)), *cert. denied*, 449 U.S. 1127 (1981). In a portion of his opinion that the en banc court did not quote, Clark is even more candid on this point: "Officer Markonni did what any reasonable, practical officer would have considered the law required him to do. He did what reasonable, practical citizens would expect him to do." 594 F.2d at 97. Thus, Judge Clark apparently endorses Agent Markonni's action, even on the assumption that it violated the defendant's fourth amendment rights. *Id.*

515. *See* note 103 *supra* (citing studies on effectiveness of exclusionary rule as a deterrent).

516. *See* United States v. Williams, 594 F.2d 86, 97-98 (1979) (Clark, J., dissenting) (exclusion of evidence deters officers from acting when criminal activity observed), *rev'd*, 622 F.2d 830 (1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

517. 403 U.S. 388 (1971). The majority in *Bivens* ruled that there was an implied a private cause of action under the fourth amendment, and allowed the plaintiff to seek damages against federal agents who performed a warrantless search without probable cause. *Id.* at 397. Chief Justice Burger dissented, arguing that creation of a damage remedy is a legislative act properly exercised only by Congress. *Id.* at 411-12 (Burger, C.J., dissenting).

518. *Id.* at 414 (Burger, C.J., dissenting).

519. *Id.* at 416.

520. *Id.* at 416. Burger noted that no empirical evidence had been produced that would show that the exclusionary rule actually deterred illegal conduct of law enforcement officials. *Id.* (citing Oaks, *supra* note 103, at 667).

521. *Id.* at 420-21.

522. *Id.* at 422-23. Not surprisingly, a deafening silence followed.

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Chief Justice Burger took a new tack. In his concurrence in *Stone v. Powell*,[523] he abandoned his *Bivens* argument for an effective tort remedy coupled with the simultaneous abolition of the exclusionary rule. Instead, he claimed that the exclusionary rule itself inhibited the development of alternative means of enforcement. The Chief Justice maintained that "[l]egislatures are unlikely to create statutory alternatives, or impose direct sanctions on errant police officers or on the public treasury by way of tort actions so long as persons who commit serious crimes continue to reap the enormous and undeserved benefits of the exclusionary rule."[524] Accordingly, Chief Justice Burger called for the Court either to overrule the exclusionary rule immediately, even in the absence of an alternative remedy, or to limit its scope to egregious, bad faith conduct.[525] Only then, he predicted, would Congress enact a statutory remedy for persons injured by police "mistakes or misconduct."[526]

Lately, the Chief Justice seems more troubled by the standards of the fourth amendment itself than by the practical effectiveness of the exclusionary rule; now he criticizes the rule for its ability to induce police compliance with standards that he deems too restrictive. In *Ybarra v. Illinois*,[527] he dissented from the majority's holding that police, when they arrive to execute a warrant to search a third person, may not search bystanders without probable cause.[528] Burger argued that the exclusionary rule should not have been applied because the police had reasonable suspicion to search the bystander.[529] Yet he couched his criticism as a further attack on the exclusionary rule. He claimed that "[t]he Court's holding is but another manifestation of the practical poverty of the judge-made exclusionary rule . . . [and] operates as but a further hindrance on the already difficult effort to police drug traffic."[530] Thus, the Chief Justice seems to recognize that application of the exclusionary rule will compel other police officers to conform to the substantive fourth amendment standards that the majority announced, and he counts this deterrent impact among the rule's costs.

Judge Malcolm Wilkey, of the United States Court of Appeals for the District of Columbia Circuit, has similarly assailed fourth amendment standards through an attack on the exclusionary rule.[531] In an article he wrote to cham-

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523. 428 U.S. 465 (1976). The majority held that when the defendant has had a full and fair opportunity to litigate his fourth amendment claim in state proceedings, federal habeas corpus review will be denied. *Id.* at 494. The court reasoned that the incremental deterrence to state police that federal habeas corpus relief would provide is not worth the cost to society in suppressing probative evidence and "free[ing] the guilty." *Id.* at 490, 495.

524. *Id.* at 500-01 (Burger, C.J., concurring). Another interpretation of these events leads to a more plausible prediction: if the legislatures are unwilling to enact a tort remedy with some teeth despite the incentive that the exclusionary rule might then be abrogated, then it is more unlikely still that we will see such legislation if that incentive is removed.

525. *Id.* at 501.

526. *Id.*

527. 444 U.S. 85 (1979).

528. *Id.* at 90, 96.

529. *Id.* at 97-98 (Burger, C.J., with Blackmun & Rehnquist, JJ., dissenting).

530. *Id.* at 97.

531. *See* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 230-31 (1978) (arguing for statutory alternative to exclusionary rule based upon internal discipline by police and external control by courts or review board). This is one of a four-article exchange with Professor Yale Kamisar. The other articles are: Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an "Empty Blessing,"* 62 JUDICATURE 337 (1979); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amend-*

pion the abolition of the rule, Judge Wilkey charged that, among other things, it impedes gun control by hampering the ability of police to conduct searches on the street:

> No matter how rigid the gun control law, no matter how illegal the possession . . . if the officer does not have what the American law calls "probable cause" to make a reasonable search under the Fourth Amendment, if he goes ahead and makes the search, finds and confiscates the weapon, the evidence of that search and that weapon cannot be introduced as evidence at trial. The result is, of course, that the man *cannot* be convicted of carrying a weapon illegally . . . .
>
> Since criminals know the difficulties of the police in making a valid search which will stand up under challenge at trial, a further result is apparent—the criminals in America *do* carry guns.[532]

In effect, Wilkey blames the exclusionary rule for preventing searches based on less than probable cause.[533] As noted by Professor Yale Kamisar, Wilkey's

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ment?, 62 JUDICATURE 66 (1978); Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979).

532. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 224-25 (1978) (emphasis in original). If criminals are insufficiently deterred from carrying guns, it surely must be because they do not believe that their weapons are likely to discovered. Judge Wilkey's suggestion that criminals will carry weapons, knowing that they might be seized, but calculating that a suppression motion will later be granted, seems simply unrealistic.

533. At one time, Wilkey proposed that instead of suppressing unlawfully-seized evidence the trial court should conduct a "mini-trial" at the conclusion of the criminal trial. At this "mini-trial," the factfinder would determine whether the police officer had violated the fourth amendment and, if so, impose a disciplinary penalty and award compensation to the injured party. *Id.* at 231. Whether Wilkey is sincere in wanting to deter violations of the fourth amendment with an alternative remedy is questionable for two reasons. First, Wilkey's professed support for an effective tort remedy is inconsistent with his endorsement of police searches "on the slightest suspicion." If such an alternative remedy worked, police would have great incentive to observe the probable cause standard to avoid personal liability. *See* notes 215-16 *supra* and accompanying text. Thus, the increase in on-the-street searches that Wilkey has called for would not occur. Second, Wilkey's proposal fails to take into account that juries are unlikely to return verdicts against individual police officers. After making such an observation, Chief Justice Burger proposed that an administrative tribunal might be better suited to hear claims against police officers. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting). A tort remedy would only deter police officers if damages were actually recovered for police misconduct.

Judge Wilkey may now have abandoned his mini-trial proposal. In his dissent in United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981) (en banc), *cert. granted*, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981), Wilkey expressed what he saw as another defect of the exclusionary rule: it "diverts resources allocated to the criminal justice system from the trial of criminals to the trial of the police." *Id.* at 1205 (Wilkey, J., dissenting) (footnote omitted). The mini-trial would result in precisely the same diversion, but after the defendant's guilt or innocence was ascertained, rather than before.

Wilkey cites a report prepared by the United States Comptroller General reporting that "[A]bout one third of federal defendants going to trial file Fourth Amendment suppression motions; most of these have formal hearings on these motions." *Id.* at 1205 n.154 (citing COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, Rep. No. GGD-79-45 (April 19, 1979) [hereinafter EXCLUSIONARY RULE REPORT]).

But Wilkey misuses his source. The thrust of the report is that the drain of judicial resources is modest indeed. According to the United States Attorneys' offices throughout the country that were surveyed, 29.8% of criminal cases going to trial involved a search or seizure. In only 10.5% of criminal cases going to trial could one-third of all cases where a search or seizure occurred, was a suppression motion even filed. EXCLUSIONARY RULE REPORT, *supra*, at 9. Thus Wilkey makes a three-fold overstatement of the number of motions filed. Furthermore, in some significant percentage of cases where a motion is filed, no hearing is held. *Id.* at 10. The report also showed that only 1.3% of the prosecutors' time was spent on fourth amendment motions (although the figure is necessarily inexact). *Id.* at 12. On the question of the defendants' benefitting from the exclusionary rule, the report concluded that in a

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criticism is "really an attack on the constitutional guaranty, not the exclusionary rule."[534]

Wilkey further laments fourth amendment restrictions on police conduct when he speaks covetously of the *in terrorem* effect in foreign jurisdictions where police can search virtually at will:[535] "The rule in other countries produces another salutary result: there is no widespread searching by the police. It is not necessary, so long as the police have *power* to do it, with resulting automatic conviction—and the criminals *know* the police have such power."[536] Despite Judge Wilkey's protestations to the contrary,[537] this is an attack on the limits that the fourth amendment places on the police, rather than on the doctrine that requires suppression of evidence when the police exceed those limits.

The recent criticism of the exclusionary rule that Burger and Wilkey have voiced, and which *Williams* in its own way exemplifies, is not new. The sub-

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mere 1.3% of the cases studied "was evidence excluded as a result of filing a fourth amendment motion." *Id.* at 11. The number acquitted as a result, although not susceptible to precise calculation, must have been fewer still. *See id.* at 13 (no certain way to determine whether inadmissibility of excluded evidence proximate cause of acquital). Furthermore, in only 0.4% of the cases in which the prosecutors declined to file charges were search or seizure problems the primary reason. *Id.* at 14. This data would seem to suggest that the costs to society of the exclusionary rule in terms of freeing the guilty would be cancelled out by about a 1% increase in the efficiency of federal law enforcement agencies.

534. Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an "Empty Blessing"*, 62 JUDICATURE 337, 343 (1979) (assailing Wilkey's argument that guns produced by search or frisk should be valid evidence).

535. Critics of the exclusionary rule often make much of the fact that the United States is one of very few countries in the world with such a rule. *See* California v. Minjares, 443 U.S. 916, 919 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) ("I feel morally certain that the United States is the only nation in the world in which the most relevant, most competent evidence . . . is mechanically excluded"); Stone v. Powell, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring) (no exclusionary rule in England or Canada, whose courts are otherwise "models of judicial decorum and fairness") (quoting Oaks, *supra* note 103, a 669); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (exclusionary rule is "unique to American jurisprudence").

There are, however, many reasons why an exclusionary rule is called for here, though not in other common law countries. *See* Saltzburg, *supra* note 44, at 193 n.299 (that other countries have not adopted rule "of no significance" for United States; rule necessary here because of unique protections of fourth amendment). The United States has a more heterogeneous population than most developed countries, which may well lessen citizen identification with the minority groups whose privacy is most likely to be invaded by the police; it has an atavistic frontier tradition that encourages public lawlessness, and it lacks a tradition of control of the police by the central government; a vastly disproportionate number of illegal arrests and searches involve suspects of victimless crimes, and our peculiarly moralistic and puritanical system of criminal law is replete with such crimes; and, finally, Americans may be less willing than citizens of other countries to enforce constitutional privacy guarantees through the political process. Kaplan, *supra* note 131, at 1031.

"Two conclusions should stand without debate," Professor Baade has written:

> First, deliberate illegality as a matter of policy, at least as a large-scale phenomenon, is peculiarly American. Second, in the American milieu, the hallowed remedies of criminal or civil liability, internal discipline, and reproof from the bench have proved to be illusory. These conclusions help explain the reluctance of other common law countries to follow American authority on illegally obtained evidence. They also reveal the logic behind the American exclusionary rule: without the rule the police has no sanction whatever against police illegality.

Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch*, 51 TEX. L. REV. 1325, 1349 (1973).

536. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 225 (1978) (emphasis in original).

537. *See* Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351, 353-54 (1979) (discussing distinction between restrictions created by fourth amendment and by exclusionary rule).

stantive requirements of the fourth amendment have previously been the real target of barbs ostensibly aimed only at the exclusionary rule. When *Mapp* extended the exclusionary rule to the states, New York City Police Commissioner Murphy complained that his police department now had to revamp its training programs from top-to-bottom.[538] Before *Mapp*, violations of the fourth amendment were of little moment in New York because illegally-seized evidence was admissible under *People v. Defore*.[539] As Commissioner Murphy observed:

> I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this . . . . I was immediately caught up in the entire program of reevaluating our procedures which had followed the *Defore* rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp* . . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen . . . .[540]

Of course, *Mapp* created no new doctrine for the police to "implement." It simply meant, for the first time, that violations of rules that had in theory applied to the police all along would lead to unpleasant consequences. Commissioner Murphy's comments suggest however, that it was not until the exclusionary rule was applied in New York that the police paid any heed to the fourth amendment.

Examining the views of both Chief Justice Burger and Judge Wilkey suggests that it is important to recognize when criticism of the exclusionary rule is really an attack on the fourth amendment. The exclusionary rule has done nothing to change the powers of the police or the rights of the citizenry. The fourth amendment sets these standards. The exclusionary rule simply declares that evidence obtained in violation of these rights is not admissible at trial.

CONCLUSION

This article has demonstrated how the good faith exception will stifle the development of fourth amendment law by whatever courts adopt it. Slowing the law development process will of itself lead to countless fourth amendment violations that might otherwise have been prevented. Furthermore, in the

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538. *See* Kamisar, *supra* note 40, at 72 (quoting Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966)). *See generally*, Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORN. L. REV. 436 (1964). Professor Kamisar reported that when the exclusionary rule was adopted in California in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), the Chief of Police of Los Angeles seemed to think that limitations on searches and seizures had just been invented. "The actual commission of a serious criminal offense will not justify affirmative police action until such time as the police have armed themselves with sufficient information to constitute 'probable cause.'" Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORN. L. REV. at 441 (quoting Parker, *The Cahan Decision Made Life Easier for the Criminal*, in X. PARKER, POLICE 117 (Wilson ed. 1957)). "As long as the Exclusionary Rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule." *Id.* (quoting Parker, *The March of Crime*, in X. PARKER, POLICE 131 (Wilson ed. 1957)).

539. 242 N.Y. 13, 150 N.E. 585 (1926); *see* note 5 *supra*.

540. Kamisar, *supra* note 40, at 72 (quoting Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966)).

hands of a trial judge who lacks enthusiasm for suppressing probative evidence, the exception will provide a ready means to admit the evidence with little risk of reversal on appeal. Ultimately, and despite the *Williams* court's contrary protestations, adoption of the good faith exception could forever alter the substantive content of the fourth amendment. It is easy to forget that we knew neither what the amendment meant nor what standards it set for law enforcement, until courts set out to give it content in the course of deciding when evidence should or should not be suppressed. With the *Williams* good faith exception in effect, the lines that have been developed through years of fourth amendment jurisprudence will soon blur. Courts will admit evidence when the police have probable cause, or "something close to it," or when it was "reasonable" to dispense with a warrant, whether or not "technically" permissible. The only question that courts will answer will come close to being whether, in a given case, what the police did was "generally reasonable." Even if the more particular standards that the fourth amendment now sets continue to exist in some way, the reasonableness question will be the only one worth answering, because only that answer will carry any consequence.

If we do not place much value on the goal of regulating the police in an effort to prevent violations of individual privacy, such an inquiry may have its virtues. In that case, however, we should debate the reasonableness standard on its merits. It is unfortunate that the good faith exception may prove to be something of a Trojan horse; in the guise of softening a sometimes harsh remedy for violations of fourth amendment rights, it may permanently alter the definition of those rights. If that is what we want, then perhaps it is what we deserve. But let us recognize what we are getting.

Colorado Revised Statutes 1973

1982 CUMULATIVE SUPPLEMENT

16-3-308. Evidence - admissibility - declaration of purpose. (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer, as defined in section 18-1-901 (3) (l), C.R.S. 1973, as a result of a good faith mistake or of a technical violation.

(2) As used in subsection (1) of this section:

(a) "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.

(b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

(3) Evidence which is otherwise admissible in a criminal proceeding and which is obtained as a result of a confession voluntarily made in a noncustodial setting shall not be suppressed by the trial court.

(4) It is hereby declared to be the public policy of the state of Colorado that when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, that it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise admissible. This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

Source: Added, L. 81, p. 922, § 1.

Law reviews. For article, "Colorado's Good-Faith Exception to the Exclusionary Rule", see 11 Colo. Law. 410 (1982). For article, "Good-Faith Exception to the Exclusionary Rule: The Fourth Amendment is Not a Technicality", see 11 Colo. Law. 704 (1982).

The exclusionary rule: why suppress valid evidence?

If we want to reduce crime, we ought to admit all the evidence into the trial—and punish the police later if they obtained any of it illegally.

by Malcolm Richard Wilkey

Editor's note: Last August, Judicature published Yale Kamisar's reply to critics of the exclusionary rule entitled "Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?". Kamisar maintained that the rule is necessary to ensure the constitutional guarantee against unreasonable searches and seizures.

This month, Judge Malcolm Wilkey argues that the rule should be abolished. He contends that it is simply a judge-made rule of evidence, that it unjustly frees many criminals, and that courts could find other ways to deter police from violating Fourth Amendment rights.

America is now ready to confront frankly and to examine realistically both the achievements and social costs of the policies which have been so hopefully enacted in the past 40 years. That reappraisal has made the most headlines in regard to economic and fiscal matters. It is imperative that this honest reappraisal include the huge social costs which American society—alone in the civilized world—pays as a result of our unique exclusionary rule of evidence in criminal cases.

We can see that huge social cost most clearly in the distressing rate of street crimes—assaults and robberies with deadly weapons, narcotics trafficking, gambling and prostitution—which flourish in no small degree simply because of the exclusionary rule of evidence. To this high price we can rightfully add specific, pernicious police conduct and lack of discipline—the very opposite of the objectives of the rule itself.

The questionable justification for such a rule is all the more apparent when we realize that it represents, not a constitutional mandate, but a policy choice by our Supreme Court. The wisdom of this policy has caused sharp and fundamental disagreement among the Justices: most of the decisions since *Mapp* in 1961 have been decided by only one or two votes.[1] Usually the people's representatives decide issues of public policy, especially when those decisions require a balancing of social values and the justices so sharply disagree, but the choice of the exclusionary rule as the only remedy for Fourth Amendment violations has shut out all consideration of alternatives, not only by the federal government but also by the 50 states.[2]

Though scholars have been shedding

Some of the ideas that the author expresses here were part of an earlier article he wrote for *The Wall Street Journal* entitled "Why Suppress Valid Evidence?" (October 7, 1977).

1. *Mapp v. Ohio, 367 U.S. 643, (1961).*

2. *See* "Time for a reappraisal" on page 221 of this issue.

more and more light on this problem,[3] few people have considered the enormous social cost of the exclusionary rule, and fewer still have thought about possible alternatives to the rule. I propose to do both those things in this article.

The rule's mystique

What is the exclusionary rule? It is a judge-made rule of evidence, originated in 1914 by the Supreme Court in *Weeks* v. *United States*,[4] which bars "the use of evidence secured through an illegal search and seizure."[5] It is not a rule required by the Constitution. No Supreme Court has ever held that it was. As Justice Black once said,

> [T]he Fourth Amendment does not itself contain

3. Chief Justice Burger's classic eloquent dissenting opinion in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971); Erwin N. Griswold, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT (1975); Carl McGowan, *Rulemaking and the Police*, 70 MICH. L. REV. 659 (1972); G. Marcus, POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE, PART II, THE EXCLUSIONARY RULE. Chicago: Aldine, 1962; Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

Also, Albert M. and Julia Carlson Rosenblatt, *A Legal House of Cards*, HARPER'S, July 1977; Steven R. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); James E. Spiotto, *The Search and Seizure Problem-Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & AD. 36 (1973); Law Reform Commission of Canada, REPORT ON EVIDENCE (1975); and the editorial pages of THE WALL STREET JOURNAL, July 12, 1971 and October 7, 1977; THE WASHINGTON STAR, July 7, 1975; and THE HOUSTON POST, November 15, 1977.

4. 232 U.S. 383 (1914). For clarity of analysis, I prefer to omit Boyd v. United States, 116 U.S. 616 (1886), which had its origin in statutory compulsory self-incrimination, a violation of the Fifth Amendment, and in which there was no actual search and seizure by government agents. *Weeks* is a clear search and seizure violation of the Fourth Amendment, with a holding of exclusion of the evidence as a result.

5. Wolf v. Colorado, 338 U.S. 25, 28 (1949).

Do other countries exclude illegally-seized evidence?

To my mind, one proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it. If there were merit in any of the grounds advanced in support of the rule, at least one other country somewhere would have emulated our 65-year-old example. All have shunned it.

As Chief Justice Burger pointed out: "This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule."[1] As Justice Frankfurter found 30 years ago: "Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which passed on the question, none has held evidence obtained by an illegal search and seizure as inadmissible."[2]

The leading case in the British Commonwealth is *Kuruma* v. *The Queen*, which arose from Kenya.[3] In appealing the death sentence, it was argued that the search, which uncovered a knife and ammunition, was illegal. In dismissing the appeal, the Privy Council held, in the words of Lord Goddard, C.J., that

> In their Lordships' opinion, the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.[4]

A century earlier an English judge put it more laconically, "It matters not how you get it; if you steal it, it will still be admissible in evidence."[5]

1. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. at 415.

2. Wolf v. Colorado, 338 U.S. at 30.

3. Kuruma v. The Queen, [1955] A.C. 197, 1 All E.R. 236.

4. *Id.* at 239.

5. Crompton, J., in R. Leatham [1861] 8 Cox C.C. 498 at 501.

any provision expressly precluding the use of such evidence and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures."

The greatest obstacle to replacing the exclusionary rule with a rational process, which will both protect the citizenry by controlling the police and avoid rewarding the criminal, is the powerful, unthinking emotional attachment to the rule. The mystique and misunderstanding of the [illegible] causes not only many ordinary citizens but also judges and lawyers to feel (not that the exclusionary rule was enshrined in the Constitution by the Founding Fathers and that to abolish it would do violence to the whole sacred Bill of Rights.[7] They appear totally unaware that the rule was not employed in U.S. courts during the first 125 years of the Fourth Amendment, that it was devised by the judiciary in the assumed absence of any other method of controlling the police, and that no other country in the civilized world has adopted such a rule. (See "Do other countries exclude illegally seized evidence?" below.)

Realistically, the exclusionary rule can probably never be abolished until both the public and the Supreme Court are satisfied that there is available in our legal system a reasonably workable alternative. Unfortunately, the converse may also be true—we

6. Mapp v. Ohio, 367 U.S. 643, 661–662 (1961) (concurring opinion).

7. "Among some of its defenders, however, the exclusionary rule assumes the status of dogma, of constitutional holy writ, so much so that they sometimes talk as if there were no decent alternative. Yet the ancient alternative, sanctioned by most state criminal codes until 1961, was the common law practice, still in force in England and most other English speaking jurisdictions. Under common law it was not deemed the duty of the court to look into the provenance of evidence—only to weigh its relevance and accuracy." THE WASHINGTON STAR, editorial, p. 16, July 7, 1975.

The text on evidence most universally used throughout the British Commonwealth recognizes that evidence from confessions will be excluded, but other evidence will be allowed.

It may therefore be concluded that, under English law, illegally obtained evidence is admissible, provided it does not involve a reference to an inadmissible confession of guilt, and subject to the overall exclusionary discretion enjoyed by the judge at a criminal trial.[6]

The rule in other countries—in England, Canada, Germany and Israel, for example—is that material evidence, if it is probative and authentic, comes in without regard to whether it was obtained legally or illegally. Two examples often cited in Anglo-American legal writings are illustrative.

German law does not exclude illegally obtained evidence, except if in the judge's opinion it has been obtained by a serious violation of fundamental rights. The nature of the illegality which is alleged to have been committed is thus evaluated.[7] Israeli law condemns the exclusionary rule as useless and unjustified. As a more workable alternative, if an illegal search occurs, the court can charge the responsible individual, convict him immediately, or send him to another judge for trial, in a proceeding roughly comparable to our contempt actions.[8]

Although the law as declared by the Supreme Court of Canada is binding on all courts in Canada, decisions of the English House of Lords will ordinarily be followed by the Supreme Court of Canada, and hence the British rule in *Kuruma* represents the Canadian law. The rule of *Kuruma* was reaffirmed by the Canadian Supreme Court in *Regina* v. *Wray*.[9]

> The Court made it clear . . . that the trial judge's discretion does not extend to excluding evidence obtained by unfair means where the probative value of such evidence is unimpeachable; and that exclusion of evidence because unfairly

6. Cross on Evidence (3d Ed., 1967), p. 267. See discussion generally pp. 266–270. ". . . [T]he English authorities on the admissibility of evidence procured in consequence of an illegal search or other unlawful act . . . are uniformly in favor of its reception although there are not many of them." *Id.* at 266.

7. Clemens, *The Exclusionary Rule Under Foreign Law: Germany* (1961) 52 J. CRIM. L. C. & P. S. 277.

8. Cohn, *The Exclusionary Rule Under Foreign Law: Israel* (1961) 62 J. CRIM. L. C. & P. S. 282.

9. 11 C.R.N.S. 225, 248 (1970).

will never have any alternative in operation until the rule is abolished. So long as we keep the rule, the police are not going to investigate and discipline their own men, and thus sabotage prosecutions by invalidating the admissibility of vital evidence.

How the rule works

The impact of the exclusionary rule may not be immediately apparent from the simple phrase of the *Wolf* decision that it bars "the use of evidence seized through an illegal search and seizure." It may help to consider three examples to see how the exclusionary rule needlessly frustrates police and prosecutors trying to do a very difficult job on the streets of our cities.

In *U.S.* v. *Montgomery*,[8] two police officers on auto patrol in a residential neighborhood at 6 p.m. on a winter day saw Montgomery driving his car in a way that suggested he was "sizing up" the area. When they stopped and identified him, they learned by radio that an arrest warrant was outstanding against him. Before taking him into custody, the officers searched him for weapons and found a .38 caliber bullet in his pants pocket, a magnum revolver loaded with six rounds and an unregistered, sawed-off shotgun with shells in the car.

A trial court convicted him of illegal possession of firearms, but the Court of Appeals (2-1) reversed, holding that no probable cause existed for stopping Montgomery in the first place, and that all evidence discovered thereafter was the product of an illegal search and seizure. Applying the exclusionary rule, the court suppressed as evidence the revolver and the sawed-off shotgun,

8. 561 F. 2d 875 (D.C. Cir. 1977).

obtained has nothing to do with securing a fair trial for the accused.[10]

The proposed Evidence Code of the Law Reform Commission of Canada contains a proposed section "Exclusion Because of Manner Evidence Obtained," which provides:

> 15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute. (2) In determing whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, . . .[11]

There follows an enumeration of the factors for the court. If adopted, this would in part, but in part only, change the rule of *Regina* v. *Wray* toward what some consider the older English common law rule.

But the proposed Canadian change would be by no means an adoption of the U.S. exclusionary rule. The commentary on the proposed rule states flatly:

> Section 15: Rules of Evidence are unlikely to prove very effective in controlling police behavior. . . . The extent of the section is not to incorporate an absolute exclusionary rule into Canadian evidence law, but to give judges the right in exceptional cases to exclude evidence unfairly obtained, and thus restore what many believe to be the English common law discretionary rule. . . .[12]

The general rule of Section 15 governs statements as well as material evidence. The following section of the proposed code excludes statements obtained in a manner which renders them unreliable. Where circumstances render a *statement* unreliable, but do not meet the strict standard of bringing 'the administration of justice in disrepute,' *real evidence* found as a result of this statement is not 'tainted,' and may not be suppressed at trial.

Proposed Section 16 would be a codification of present Canadian law and is directly contrary to the decision of the United States Supreme Court in *Brewer* v. *Williams*,[13] just as Section 15 as well as present Canadian law is directly contrary to *Coolidge* v. *New Hampshire*.[14]

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10. James Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & A. 430 (1973).

11. Law Reform Commission of Canada, REPORT ON EVIDENCE 22 (1975).

12. *Id.* at 61-63.

13. 430 U.S. 387 (1977).

14. 403 U.S. 443 (1971).

'Our way of supporting the Constitution is not to strike at the policeman who breaks it but to let off somebody else who broke something else.'

John H. Wigmore

which made it impossible to convict Montgomery or to retry the case.

Montgomery is an example of typical routine police work, which many citizens would think of as needed reasonable effort to prevent crime.[9] But now look at *U.S.* v. *Willie Robinson*,[10] a similar case with a different result. A policeman stopped Robinson for a minor traffic violation and discovered that license bureau records indicated his license was probably a forgery. Four days later, the same officer spotted Robinson about 2 a.m. and arrested him for driving with a forged credential.

Since police regulations required him to take Robinson into custody, the officer began a pat down or frisk for dangerous weapons. Close inspection of the cigarette package in the outer pocket of the man's jacket revealed heroin. Robinson was convicted of heroin possession but the Court of Appeals held 5-4 that, in light of the exclusionary rule, the search of Robinson was illegal and the heroin evidence must be suppressed. The Supreme Court reversed, holding that probable cause existed for the search, the evidence was legally obtained, and it could be offered in evidence. The High Court reinstated the original conviction.

This is one search and seizure case which turned out, in my view, correctly. But it took a U.S. District Court suppression hearing, a 2-1 panel decision in the Court of Appeals, a 5-4 decision in the court *en banc*, and a 6-3 decision of the Supreme Court to confirm the validity of the on-the-spot judgment of a lone police officer exercised at 2 a.m. on a Washington Street—five years and eight months earlier.

In *Coolidge* v. *New Hampshire*,[11] a 14-year old girl was found with her throat slit and a bullet in her head eight days after she had disappeared. Police contacted the wife of a suspect whose car was like one seen near the crime, and she gave them her husband's guns. Tests proved that one of the weapons had fired the fatal bullet.

Invoking his statutory authority, the attorney general of the state issued a warrant for the arrest of the suspect and the seizure of his car. Coolidge was captured and convicted. But the Supreme Court reversed the conviction on the grounds that the warrant was defective, the search of the auto unreasonable and vacuum sweepings from the auto (which matched the victim's clothing) were inadmissible. Why? Because the attorney general who issued the warrant had personally assumed direction of the investigation and thus was not a "neutral and detached magistrate."

Observe that here the conviction was reversed because of a defect in the warrant, not because of any blunder. Errors of law by either the attorney preparing the affidavit and application for the warrant or the magistrate in issuing the warrant frequently invalidate the entire search that the police officers make, relying in good faith on the

9. Compare former Solicitor General Griswold's principle on seeking certiorari: "If the police officer acted decently, and if he did what you would expect a good careful conscientious police officer to do under the circumstances, then he should be supported." Griswold, *supra* n. 3, at 57–58.

10. 414 U.S. 218 (1973), *reversing* 471 F.2d 1082 (1972). *See* comments by Griswold, *supra* n. 3, at 64–67.

11. 403 U.S. 443 (1971). *Compare Coolidge* with the more recent Brewer v. Williams, 430 U.S. 387 (1977), which was an exclusionary rule case under the Sixth Amendment right to counsel. The Supreme Court held 5-4 that the prisoner's Sixth Amendment right to counsel was violated, the confession was thus illegally obtained, the evidence of location of the murdered girl's body was thus tainted because it was derived from the illegal confession, and the exclusionary rule would exclude the evidence of the prisoner's statements and the location of the body.

warrant; those errors cause the suppression of the evidence and the reversal of the conviction. How does the exclusionary rule improve police conduct in such cases?

The Court's rationale

Deterrence: During the rule's development, the Supreme Court has offered three main reasons for the rule. The principal and almost sole theory today is that excluding the evidence will punish the police officers who made the illegal search and seizure or otherwise violated the constitutional rights of the defendant, and thus deter policemen from committing the same violation again.[12] The flaw in this theory is that there is absolutely no empirical data that excluding evidence against a defendant has anything to do with either punishing police officers or thereby deterring them from future violations.

Chief Justice Burger has flatly asserted ". . . there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials,"[13] and the Supreme Court has never sought to adduce such empirical evidence in support of the rule. Probably such a connection can never be proved, for as a matter of logical analysis "the exclusionary rule is well tailored to deter the prosecutor from illegal conduct. But the prosecutor is not the guilty party in an illegal arrest or search and seizure, and he rarely has any measure of control over the police who are responsible."[14]

Privacy: From *Weeks* (1914) to *Mapp* (1961) the rule was also justified as protecting the privacy of the individual against illegal searches and seizures as guaranteed by the Fourth Amendment.[15] The Supreme Court later downgraded the protection of privacy rationale,[16] perhaps because of the obvious defect that the rule purports to do nothing to recompense innocent victims of Fourth Amendment violations, and the gnawing doubt as to just what right of privacy guilty individuals have in illegal firearms, contraband narcotics and policy betting slips—the frequent objects of search and seizure![17]

Judicial integrity: A third theme of the Supreme Court's justifying rationale, now somewhat muted, is that the use of illegally obtained evidence brings the court system into disrepute. In *Mapp* Justice Clark referred to "that judicial integrity so necessary in the true administration of justice,"[18] which was reminiscent of Justice Brandeis dissenting in *Burdeau* v. *McDowell*," . . . respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."[19]

The impact of the rule

It is undeniable that, as a result of the rule, the most valid, conclusive, and irrefutable factual evidence is excluded from the knowledge of the jury or consideration by

12. "[T]he rule's prime purpose is to deter future unlawful police conduct," Justice Powell in United States v. Calandra, 414 U.S. 338, 347 (1974); "its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Justice Stewart in Elkins v. United States, 364 U.S. 206, 217 (1960); ". . . all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action," Justice Clark in Linkletter v. Walker, 381 U.S. 618, 636–37 (1965).

13. Chief Justice Burger, dissenting in Bivens, 403 U.S. at 416.

14. Oaks, *supra* n. 3, at 726.

15. "Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the due process clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the federal government." Justice Clark in Mapp, 367 U.S. at 655.

16. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: 'the ruptured privacy of the victim's homes and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965)." Justice Powell in United States v. Calandra, 414 U.S. 338, 347 (1974). No one suggests, of course, that the Fourth Amendment purpose of protecting privacy is itself downgraded; the downgrading is of the exclusionary rule as a method of protecting that privacy.

17. Schlesinger, *supra* n. 3, at 47–50.

18. Mapp, 367 U.S. at 660.

19. 256 U.S. 465, 477 (1921). Cf. Olmstead v. United States, 277 U.S. 438, 485 (1928). (Holmes, J., dissenting) ("[F]or my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.") Since Justice Holmes, an admirer of the common law, also said, "The life of the common law has not been logic, but experience," I have always wished he could review America's experience with the exclusionary rule since 1928, and tell us his updated opinion.

Time for a reappraisal

Citizens from many different quarters have recently begun to question anew the wisdom of the exclusionary rule

"Surely a rule of such profound social dimensions should spring from something closer to social consensus than to judicial or legal dialectic," wrote Albert M. and Julia Carlson Rosenblatt in "A Legal House of Cards," *Harper's* (July 1977). "It is mistakenly assumed that these results are somehow mandated by the Constitution. The Fourth Amendment condemns unreasonable searches, but it does not decree that insult be added to injury, that the public be affronted first by the crime and then by the release of the acknowledged malefactor. Lacking an efficient legislative scheme by which citizens could be guaranteed their Fourth Amendment rights, the Supreme Court chose the exclusionary rule.'

Only 10 years after *Mapp*, Mr. Justice Harlan called for a thorough-going reappraisal of the rule in a concurring opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 490–91 (1971). "From the several opinions that have been filed in this case, it is apparent that the law of search and seizure is due for an overmauling. . . . I would begin this process of reevaluation by overruling *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and *Ker* v. *California*, 374 U.S. 23 (1963). . . . In combination *Mapp* and *Ker* have been primarily responsible for bringing about serious distortions and incongruities in this field of constitutional law. . . . The states have been put in a federal mold with respect to this aspect of criminal law enforcement, thus depriving the country of the opportunity to observe the effects of different procedures in similar settings. (Oaks suggested) that the assumed 'deterrent value' of the exclusionary rule has never been adequately demonstrated or disproved, and point(ed) out that because of *Mapp* all comparative statistics are 10 years old and no new ones can be obtained."

Justice Harlan's disillusionment 10 years after *Mapp* was reflected in the *Wall Street Journal*. On June 21, 1961, at the close of the Supreme Court term, the *Journal* ran a lead editorial, "The Right to be Secure," generally praising the *Mapp* decision. Ten years later, on July 12, 1971, at the close of the Supreme Court term, the *Journal* ran a lead editorial, "An Alternative Needed," calling for a reexamination of the rule and endorsing Chief Justice Burger's dissents in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 411 (1971), and *Coolidge* v. *New Hampshire*, *supra*, at 492. *M. R. W.*

the judge. As Justice Cardozo predicted in 1926, in describing the complete irrationality of the exclusionary rule:

> The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free.[20]

20. People v. DeFore, 242 N.Y. 13, 21, 23–24, 150 N.E. 585, 587–588 (1926).

Fifty years later Justice Powell wrote for the Court:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: . . . the physical evidence sought to be excluded is typically reliable and often the most probative evidence bearing on the guilt or innocence of the defendant. . . . Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police

officer and the windfall afforded the guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.[21]

I submit that justice is, or should be, a truth-seeking process. The court has a duty to the accused to see that he receives a fair trial; the court also has a duty to society to see that all the truth is brought out; only if all the truth is brought out can there be a fair trial.[22] The exclusionary rule results in a complete distortion of the truth. Undeniable facts, of the greatest importance, are forever barred—facts such as Robinson's heroin, Montgomery's sawed-off shotgun and pistol, the bullet fired from Coolidge's gun and the sweepings from his car which contained items from the dead girl's clothes.

If justice is a truth-seeking process, it is all important that *there is never any question of reliability* in exclusionary rule cases involving material evidence, as the three examples illustrate. We rightly exclude evidence whenever its reliability is questionable—a coerced or induced confession,[23] for example, or a faulty line-up for identification of the suspect.[24] We exclude it because it is inherently unreliable, not because of the illegality of obtaining it.[25] An illegal search in no way reduces the reliability of the evidence.

There have been several empirical studies on the effects of the exclusionary rule in five major American cities—Boston, Chicago, Cincinnati, New York and Washington, D.C.—during the period from 1950 to 1971. These have been recently collected and analyzed, along with other aspects of the exclusionary rule and its alternatives, by Professor Steven Schlesinger in his book, *Exclusionary Injustice: The Problem of Illegally Obtained Evidence.*[26]

Three of these studies concluded that the exclusionary rule was a total failure in its primary task of deterring illegal police activity and that it also produced other highly undesirable side effects. The fourth study, which said the first three were too harsh in concluding that the rule was totally ineffective, still said: "Nonetheless, the inconclusiveness of our findings is real enough; they do not nail down an argument that the exclusionary rule has accomplished its task."[27]

Schlesinger and others regard the study by Dallin Oakes as perhaps the most comprehensive ever undertaken, both in terms of data and the breadth of analysis of the rule's effects. Oakes concluded:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. . . . The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.[28]

Spiotto made a comparative study of both the American exclusionary rule and the existing Canadian tort alternative, taking Chicago and Toronto as comparable metropolitan areas. He found that an

> empirical study [of narcotics and weapons cases] indicates that, over a 20-year period in Chicago, the proportion of cases in which there were motions to suppress evidence allegedly obtained illegally increased significantly. This is the oppo-

21. Stone v. Powell, 428 U.S. 465, 489-90 (1976) (footnotes omitted).

22. "In a free society, the government owes its citizens freedom from crime as well as freedom from governmental intrusion." Rosenblatt, *supra* n. 3.

23. Miranda v. Arizona, 384 U.S. 436 (1966).

24. U.S. v. Wade, 388 U.S. 218 (1967); Gilbert v. California 388 U.S. 263 (1967).

25. One type case in which the evidence in some circumstances may be reliable, but where the exclusionary rule may be justified, is that exemplified by Rochin v. California, 342 U.S. 165 (1952), in which the police measures employed were said to shock the conscience. On the facts graphically described by Justice Frankfurter, application of the exclusionary rule was approved on the basis of these extraordinary circumstances.

While he did not draw the analogy, Justice Frankfurter (who wrote *Wolf*, which refused to apply the exclusionary rule to the states; dissented in *Elkins*, which abolished the Silver Platter doctrine, and joined in the dissent in *Mapp*, which reversed *Wolf*) probably approved *Rochin* on what is said to be the older English rationale giving judges the right in exceptional cases to exclude evidence which would tend to bring the administration of justice into disrepute. That discretion still exists in English law, Kuruma v. The Queen, [1955] A.C. 197, 1 All E.R. 236, but it is rarely exercised and then only in truly exceptional cases.

26. S. Schlesinger, *supra* n. 4.

27. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Premature Conclusion*, 62 Ky. L. J. 681, 726 (1973-74).

28. Oakes, *supra* n. 3, at 755.

site result of what would be expected if the rule had been efficacious in deterring police misconduct.[29]

Three studies conducted between 1950 and 1971 show a substantial increase in motions to suppress in both narcotics and gun offenses.[30] The increase from 1950 to 1971 can fairly be attributed to the impact of *Mapp* (1961) on search and seizure in the state courts.

Criticisms of the rule

By this point, we should be able to see that the exclusionary rule actually produces many effects opposite from those that the Court intended to produce. No matter what rationale we consider, the rule in its indiscriminate workings does far more harm than good and, in many respects, it actually prevents us from dealing with the real problems of Fourth Amendment violations in the course of criminal investigations.

In the eyes of the Supreme Court, the first and primary rationale of the exclusionary rule is deterrence. I submit that all available facts and logic show that excluding the most reliable evidence does absolutely nothing to punish and thus deter the official wrongdoer.,[31] but the inevitable and certain result is that the guilty criminal defendant goes free.

The second—now rather distant second—rationale in the eyes of the Court has been the protection of privacy. I submit a policy of excluding incriminating evidence can never protect an innocent victim of an illegal search against whom no incriminating evidence is discovered. The only persons protected by the rule are the guilty against whom the most serious reliable evidence should be offered. It cannot be separately argued that the innocent person is protected *in the future* by excluding evidence against the criminal *now*, for this is only the deterrent argument all over again.

The third rationale found in the past opinions of the Court is that the use of illegally obtained evidence brings our court system into disrepute. I submit that the exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system.

Ask any group of laymen if they can understand why a pistol found on a man when he is searched by an officer should not be received in evidence when the man is charged with illegal possession of a weapon, or why a heroin package found under similar circumstances should not be always received in evidence when he is prosecuted for a narcotics possession, and I believe you will receive a lecture that these are outrageous technicalities of the law which the American people should not tolerate.[32] If you put the same issue to a representative group of lawyers and judges, I predict you would receive a strong preponderance of opinions supporting the lay view, although from those heavily imbued with a mystique of the exclusionary rule as of almost divine origin you would doubtless hear some support.[33]

The rationale of protecting judicial integrity is also inconsistent with the behavior of the courts in other areas of the criminal law. For example, it is well settled that courts

29. Spiotto, *supra* n. 3, at 36, 37.

30. Schlesinger, *supra* n. 3, at 50–51.

31. "With supreme irony, those who pooh-pooh the deterrent effect of punishment on criminal activity are the first to exalt it as a device to curb police misconduct. But if the threat of prison does not deter thieves, how may police misconduct be stemmed by such impersonal penalties as the judicial dismissal of cases? Both failures have a point in common: the sanction is either absent or blunted (in the case of the police) or, in the case of criminals, delayed, diminished, or denied." Rosenblatt, *supra* n. 3.

32. "Given the decisions this rule tends to produce and the obvious need to bolster public confidence that courts do dispense justice, it is scarcely unreasonable to ask that it be reexamined." THE WALL STREET JOURNAL, Editorial, p. 8, July 12, 1971.

"... from the point of view of laymen unversed in refinements of constitutional theory, [the American exclusionary rule] is sometimes an outrage to common sense. It often results in the freeing of someone convicted of a vicious criminal act for what strikes the crime-conscious public as finicking or trivial reasons." THE WASHINGTON STAR, editorial, p. A16, July 7, 1975.

"Through a bizarre sense of achieving justice, we have come to free the criminal and harass the innocent, an absurdity that would likely be sensibly ordered in a more primitive society." THE HOUSTON POST, editorial, p. 2E, November 16, 1977.

33. Dean Wigmore was not a believer in the rule: "Our way of supporting the constitution is not to strike at the police officer who breaks it but to let off somebody else who broke something else," quoted in Rosenblatt, *supra* n. 3.



How the exclusionary rule hampers gun control

A striking feature of the motion to suppress for illegal search and seizure is that it is a defense weapon peculiarly suited to narcotic, gun, and gambling crimes, and only incidentally to other felony charges. Complete data on three branches of the circuit court in Chicago for three months in 1971 confirms that these kinds of cases are most likely to generate motions to suppress: narcotics—878 such motions; guns—335; gambling—255; and all other felony offenses—84.[1]

One of the best illustrations of the social cost of the exclusionary rule—and one that wasn't suggested until recently—is the relationship of the rule to effective gun control in these United States. There are varying degrees of gun control—complete ban, registration, registration of some weapons, or no restrictions at all—on which I take no position. The common, fatal flaw in every scheme of gun control about which I have read is that it is doomed to be totally ineffective in preventing the habitual use of weapons in street crimes so long as the exclusionary rule hampers the police in enforcing it.

Has it ever struck our national consciousness that the United States is unique in two ways—among the civilized nations, we have the most extraordinary crime rate involving firearms *and* a rule which excludes the most convincing evidence available, a rule which exists in no other country in the civilized world? These two unique features of our daily lives—crimes with firearms and a rule barring the use of perfectly valid evidence—are not unconnected.

No matter how rigid the gun control law, no matter how illegal the possession—whether sawed-off shotgun, automatic pistol, or submachine gun—if the officer does not have what the American law calls "probable cause" to make a reasonable search under the Fourth Amendment, if he goes ahead and makes the search, finds and confiscates the weapon, the evidence of that search and that weapon cannot be introduced as evidence at the trial.[2] The result is, of course, that the man *cannot* be convicted of carrying a weapon illegally. "The criminal is to go free because the constable has blundered."

Since criminals know the difficulties of the police in making a valid search which will stand up under challenge at trial, a further result is apparent—the criminals in

1. Steven R. Schlesinger, EXCLUSIONARY INJUSTICE, THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 51, 1977.

2. I am not suggesting that abolishing the rule will result in a wholesale abandonment of any standard of probable cause for a valid search. Not at all. The standard of probable cause required is a totally different issue, one that I do not specifically address in this article. Whatever the standard of probable cause, with an effective, alternative method of disciplining the police, they may well make fewer illegal searches and yet prosecutors may bring more prosecutions (and more successful prosecutions) for gun and narcotic violations than they do today.

Why fewer illegal searches? A strict disciplinary mechanism for police who violate Fourth Amendment rights should curtail the more flagrant violations. Why more prosecutions? Realistically, we must recognize that there will always be instances of police in good faith overstepping the line, making a search without probable cause. Without the exclusionary rule, prosecutors could introduce the evidence from such searches and convict more defendants.

One might argue that, under an alternative mechanism, gun control laws would depend upon the illegal searches and seizures that we anticipate. But that argument shouldn't prevent us from abolishing the exclusionary rule, which itself produces an extraordinary number of illegal searches and seizures (some for pure harassment purposes). Rather, that argument should encourage us to draft better gun control laws and to improve police training so officers make only valid searches and seizures.

America *do* carry guns. Knowing that they will not be stopped on the street and searched unless they do something drastically suspicious—more suspicious than Montgomery or Robinson in the cases I described in the text—the criminal will carry a gun and laugh in the face of the officer who might wish to search him for it. So long as the criminal can avoid misbehavior which would give the officer the right to arrest him (as Willie Robinson did) the criminal can parade in the streets with a great bulge in his pocket or a submachine gun in a blanket under his arm.

Compare the results in other countries—in England neither the police nor the criminals carry guns. Why? The criminals know that the police have a right to search them on the slightest suspicion, and they know that if a weapon is found, they will be prosecuted.[3] Whenever a man is caught with a gun or narcotics in his possession in England or Canada, conviction is virtually automatic—there is no denying the fact of possession, there is no exclusion of the evidence, no matter how obtained.

The rule in other countries produces another salutary result: there is no widespread searching by the police. It is not necessary, so long as the police have *power* to do it, with resulting automatic conviction—and the criminals *know* the police have such power.

Under our unique exclusionary rule, the American people have the worst of it both ways: (1) criminals do carry guns—and use them; (2) police know this, so they engage in far more searches and seizures, some of which are blatantly illegal. Thus, the American people are harassed more by *both* criminals *and* police than in other civilized countries.[4] *M. R. W.*

3. Of course, I do not exclude other causes for this difference, such as historical tradition, racial factors, geography and environment. But surely the factor I am discussing has a powerful effect in aggravating the problem.

4. Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule,* 1 J. POLICE SCI. & AD. 36, 37 (1973); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives,* 2 J. LEGAL STUDIES 243 (1973); Schlesinger, *supra* n. 1, at 50.

will try defendants who have been illegally seized and brought before them. In *Ker* v. *Illinois*,[34] a defendant kidnapped in Peru was brought by force to Illinois for trial; in *Mahon* v. *Justice*[35] the accused was forcibly abducted from West Virginia for trial in Kentucky; and in *Frisbie* v. *Collins*,[36] the defendant was forcibly seized in Illinois for trial in Michigan.

Said the *Frisbie* court:

> This court has never departed from the rule announced in *Ker* v. *Illinois* . . . that the power of the court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of 'forcible abduction.'[37]

Why should there be an exclusionary rule for illegally seized evidence when there is no such exclusionary rule for illegally seized people? Why should a court be concerned about the circumstances under which the murder weapon has been obtained, while it remains unconcerned about the circumstances under which the murderer himself has been apprehended? it makes no sense to argue that the admission of illegally seized evidence somehow signals the judiciary's condonation of the violation of rights when the judiciary's trial of an illegally-seized *person* is not perceived as signaling such condonation.

Other defects of the rule

The rule does not simply fail to meet its declared objectives; it suffers from five other defects, too. One of those defects is that it uses an undiscriminating, meat-ax approach in the most sensitive areas of the administration of justice.[38] It totally fails to discrimi-

34. 119 U.S. 436 (1886).
35. 127 U.S. 700 (1888).
36. 342 U.S. 519 (1952).
37. *Id. See also* Gerstein v. Pugh, 420 U.S. 103, 119 (1975).
38. Neither this criticism, nor the other objection to the undiscriminating manner in which the exclusionary rule operates, is intended to suggest that a more discriminating application of the exclusionary rule—as via some form of balancing—would be tolerable. Given the weakness of the rationale for any exclusionary rule whatsoever, the rule should be discarded. The textual discussion was intended merely to illustrate the exceedingly poor fit between the exclusionary rule and the values relevant to any Fourth Amendment remedial scheme.

nate between the degrees of culpability of the officer or the degrees of harm to the victim of the illegal search and seizure.

It does not matter whether the action of the officer was grossly willful and flagrant or whether he was conscientiously using his very best judgment under difficult circumstances; the result is the same: the evidence is out. The rule likewise fails to distinguish errors of judgment which cause no harm or inconvenience to the individual whose person or premises are searched, except for the discovery of valid incriminating evidence, from flagrant violations of the Fourth Amendment as in *Mapp* or *Rochin*.[39] Chief Justice Burger's point in *Bivens* is undeniable:

> . . . society has at least as much right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition.[40]

When police know that describing the search truthfully will taint the evidence, they may perjure themselves to convict the defendant.

Another defect is that the rule makes no distinction between minor offenses and more serious crimes. The teenage runner caught with policy slips in his pocket and the syndicate hit man accused of first degree murder are each automatically set free by operation of the exclusionary rule, without any consideration of the impact on the community. Customarily, however, we apply different standards to crimes which vary as to seriousness, both in granting bail before trial and in imposing sentence afterwards.

A third problem is that, strangely, a rule which is supposed to discipline and improve police conduct actually results in encouraging highly pernicious police behavior. A policeman is supposed to tell the truth, but when he knows that describing the search truthfully will taint the evidence and free the suspect, the policeman is apt to feel that he has a "higher duty" than the truth. He may perjure himself to convict the defendant.[41]

Similarly, knowing that evidence of gambling, narcotics or prostitution is hard to obtain under the present rules of search and seizure, the policeman may feel that he can best enforce [illegible] by stepping up the incidence of searches and seizures, making them frequent enough to be harassing, with no idea of ultimate prosecution. Or, for those policemen inclined *ab initio* to corruption, the exclusionary rule provides a fine opportunity to make phony raids on establishments, deliberately violating the standards of the Fourth Amendment and immunizing the persons and premises raided—while making good newspaper headlines for active law enforcement.

Fourth, the rule discourages internal disciplinary action by the police themselves. Even if police officials know that an officer violated Fourth Amendment standards in a particular case, few of them will charge the erring officer with a Fourth Amendment violation: it would sabotage the case for the prosecution before it even begins. The prosecutor hopes the defendant will plea bargain and thus receive some punishment, even if the full rigor of the law cannot be imposed because of the dubious validity of the search. Even after the defendant has been

39. Schlesinger, *supra* n. 3, at 62.
40. Bivens, 403 U.S. at 419.
41. Judge Rosenblatt has written: "While intended to curb abuse of police power, the exclusionary rule has opened up a whole new field of police misconduct: perjury. Police officers who testify at suppression hearings have sometimes shown a remarkable facility for adjusting facts to fit the court's constitutional sensabilities. . . . Moreover, the rule has tarnished the reputation of the conscientious, honest policeman in the eyes of the public, while eroding self-respect within the profession. . . . Because the public does not fully understand the exclusionary rule, a victim will see only the outrageous release of his assailant, and may very well assume that someone was paid off." Rosenblatt, *supra* n. 3.

convicted or has pleaded guilty, it would be dangerous to discipline the officer—months or years later—because the offender might come back seeking one of the now popular post-conviction remedies.

Finally, the existence of the federally imposed exclusionary rule makes it virtually impossible for any state, not only the federal government, to experiment with any other methods of controlling police. One unfortunate consequence of *Mapp* was that it removed from the states both the incentive and the opportunity to deal with illegal search and seizure by means other than suppression.[42] Justice Harlan, in commenting on the evil impact of the federal imposition of the exclusionary rule on the states, observed:

> Another [state], though equally solicitous of constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with constitutional infractions by other means.[43]

Alternatives to the rule

The excuse given for the persistence of the exclusionary rule in this country is that there is no effective alternative to make the police obey the law in regard to unreasonable searches and seizures. If this excuse did not come from such respected sources, one would be tempted to term it an expression of intellectual bankruptcy.

"No effective alternative"? How do all the other civilized countries control their police? By disciplinary measures against the erring policeman, by effective civil damage action against both the policeman and the government—not by freeing the criminal. Judging by police conduct in England, Canada and other nations, these measures work very well. Why does the United States alone rely upon the irrational exclusionary rule?

It isn't necessary. Justice Frankfurter in *Wolf* (1949) noted that none of the 10 jurisdictions in the British Commonwealth had held evidence obtained by an illegal search and seizure inadmissible, and "the jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. . . ."[44] Justice Harlan in his dissent in *Mapp* noted the wisdom of allowing all evidence to be brought in and "dealing with constitutional infractions by other means."[45] Justice Black, concurring in *Mapp*, noted that the Fourth Amendment did not itself preclude the use of illegally obtained evidence.[46]

In his dissent in *Bivens*, Chief Justice Burger suggested that Congress provide that Fourth Amendment violations be made actionable under the Federal Tort Claims Act,[47] or something similar. Senator Lloyd Bentsen and other members of Congress have put forward proposals to abolish the rule and substitute the liability of the federal government toward the victims of illegal searches and seizures, both those innocent and those guilty of crimes.[48]

The purposes of an alternative

Before examining what mechanism we might adopt in place of the exclusionary rule as a tool for enforcing the rights guaranteed by the Fourth Amendment, let us see clearly what objectives we desire to achieve by such alternatives.

The *first* objective, in sequence and perhaps in the public consciousness of those who are aware of the shortcomings of the rule, is to prevent the unquestionably guilty from going free from all punishment for their crime—to put an end to the ridiculous situation that the murderer goes free because the constable has blundered. Let me reiterate: the exclusionary rule, as applied to tangible evidence, has never prevented an innocent person from being convicted.[49]

Second, the system should provide effective guidance to the police as to proper conduct under the Fourth Amendment. When appellate courts rule several years

42. Schlesinger, *supra* n. 3, at 85; Oaks, *supra* n. 3, at 753.

43. Mapp, 367 U.S. at 681 (Harlan, J., dissenting).

44. Wolf, 338 U.S. at 29–30.

45. Mapp, 367 U.S. at 680–81.

46. 367 U.S. at 661–62.

47. Bivens, 403 U.S. at 421–22.

48. S. 881, 93rd Cong., 1st Sess. (1973). *See* Schlesinger, *supra* n. 3, at 89.

49. This is in contrast to the exclusionary rule as applied to coerced confessions or faulty lineups, in which instances the evidence is properly excluded because of its inherent unreliability.

after the violation, their decisions are not only years too late, but usually far too obscure for the average policeman to understand. They are remote in both time and impact on the policeman at fault. Immediate guidance to the policeman as to his error, with an appropriate penalty, is obviously more effective, in contrast to simply rewarding the criminal.

Third sequentially, but first in value, the mechanism should protect citizens from Fourth Amendment violations by law enforcement officers. (I say sequentially, because it is necessary first to abolish the exclusionary rule and then to provide guidance to the police). If police receive immediate and meaningful rulings, accompanied by prompt disciplinary penalties, they will be effectively deterred from future wrongful action and citizens will thus be effectively protected.

Under the present rule, the guilty go free as a result of an illegal search, but the innocent are never compensated for the injuries they suffered.

Fourth, the procedure should provide effective and meaningful compensation to those citizens, particularly innocent victims of illegal searches and seizures. This the present exclusionary rule totally fails to do. Only the guilty person who has suffered an illegal search and seizure receives some form of compensation—an acquittal, which is usually in gross disproportion to the injury inflicted on him by an illegal search and seizure. Thus, under the present irrational exclusionary rule system, the guilty are over-rewarded by a commutation of all penalties for crimes they did commit and the innocent are never compensated for the injuries they suffered.

The magnitude of the offense

Fifth, it should be an objective of any substitute for the exclusionary rule to introduce comparative values into what is now a totally arbitrary process and inflexible penalty. Under the exclusionary rule, the "penalty" is the same irrespective of the offense. If an officer barely oversteps the line on probable cause and seizes five ounces of heroin from a peddler on the street corner, or an officer without a warrant and without probable cause barges into a home and seizes private papers, the result is automatic—the evidence is barred, the accused is freed, and this is all the "punishment" the officer receives.

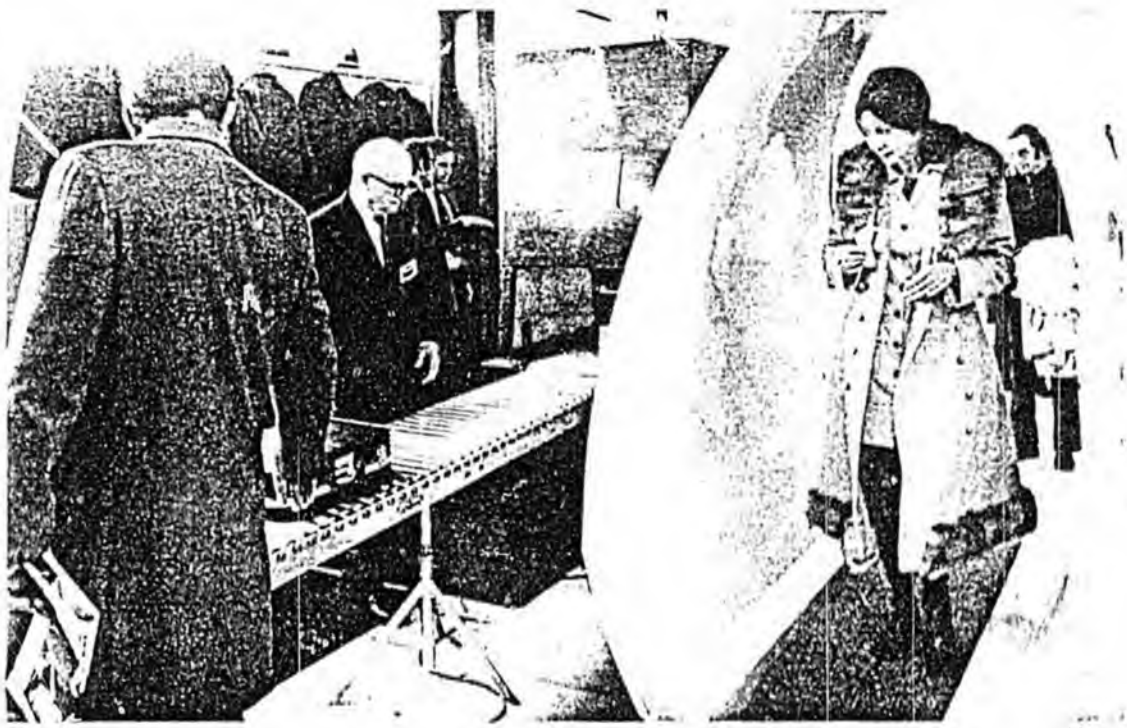
Surely the societal values involved in the two incidents are of a totally different magnitude. The error of the officer in dealing with narcotics peddlers should not be overlooked, his misapprehension of the requirement of probable cause should be called to his attention quickly in a way which he will remember, but actual punishment should be relatively minimal. In the instance of an invalid seizure of private papers in the home, the officer should be severely punished for such a gross infraction of Fourth Amendment rights.

The exclusionary rule is applied automatically now when there is no illegal action by investigative officers and hence no possible deterrence to future police misconduct. For example, where government agents have dutifully applied to a judge or magistrate for a search warrant, and executed the warrant in strict conformity with its terms, a warrant which later proves defective will force the judge later to exclude the evidence illegally seized.[50] All that is involved in these instances is a legal error on the part of the judge, magistrate, or perhaps the attorney

50. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Aguilar v. Texas, 378 U.S. 108 (1964); Franks v. Delaware (No. 77-5176) (U.S. Sup. Ct., June 26, 1978), slip op. 617, dissent 5.

who drew the papers. It is absurd to say that the court subsequently is "punishing" or attempting to "deter" the judge, magistrate, or attorney who made the legal error by suppressing the evidence and letting the accused go free, but this is what happens now.

If these are valid objectives in seeking a substitute procedure for the exclusionary rule as a method of enforcing Fourth Amendment rights, there seem to be two general approaches which might well be combined in our statute—internal discipline by the law enforcement authorities themselves, and external control by the courts or an independent review board.



COMPIX

Do people object to airport searches?

The American people have accepted and supported the fairly rigorous search for dangerous weapons at airports. Several years ago hijackers made flying so dangerous that citizens acquiesced to an invasion of their right to privacy and non-molestation. They accepted logical measures of control over weapons, even though i was inconvenient.

Only a small percentage of Americans travels by air. But all of us use our streets, shopping centers, and other public places where armed robberies and assaults happen every day. If the people are willing to accept strong measures of gun control by more effective searches and seizures at the airports, I submit that they are not only willing but eager to see more effective searches and seizures of deadly weapons on the streets. It is apparent, if one reflects a moment, that the exclusionary rule prevents effective gun control. Abolishing the exclusionary rule and punishing those who carry deadly weapons would receive widespread acclaim.

It is significant that, whatever the original misgivings of a few civil libertarians, no court has ruled that the law enacted by Congress providing for airport searches authorized an unreasonable search and there-

Internal discipline

Disciplinary action against the offending law enforcement officer could be initiated by the law enforcement organization itself or by the person whose Fourth Amendment rights had been allegedly violated. The police could initiate action either within the regular command structure or by an overall disciplinary board outside the hierarchy of command. Many law enforcement organizations have such disciplinary boards now and they could be made mandatory by statute in all federal law enforcement agencies. Wherever they may be located, the organization would require action to be taken following the seizure of material evidence, if the criminal trial or an independent investigation showed a violation of the Fourth Amendment standards.

The person injured could also initiate action leading to internal discipline of the offending officer by complaint to the agency disciplinary board. Each enforcement agency or department could establish a process to hear and decide the complaint, providing both a penalty for the offending officer (if the violation were proved) and government compensation to the injured party.

This procedure would cover numerous cases in which citizens suffer violations of Fourth Amendment rights, but in which no court action results. The injured party could choose this administrative remedy in lieu of court action, but any award in the administrative proceedings would be taken into account by a court later if a citizen, dissatisfied with the award, instituted further legal action.

The penalty against the officer would be tailored to fit his own culpability; it might be a reprimand, a fine, a delay in promotion, a suspension, or discharge. Factors bearing upon the extent of the penalty would include the extent to which the violation was willful, the manner in which it deviated from approved conduct, the degree to which it invaded the privacy of the injured party, and the extent to which human dignity and societal values were breached.

Providing compensation to the injured party from the government is necessary, for it is simply realistic to make the government liable for the wrongful acts of its agent in order to make the prospect of compensation

fore was invalid under the Fourth Amendment. Some people mistakenly objected that the Constitution bars *all* searches but, in fact, the Fourth Amendment only bars "unreasonable" searches and seizures. What is an unreasonable search and seizure is certainly, in the first instance, the duty of Congress to declare.

The danger of armed hijacking of an airplane provided a perfectly reasonable basis in law to insist upon searches of possessions and persons as a condition to boarding an aircraft. Furthermore, police sometimes spotted people who, seeing the rigor of the check, turned back from the search at the gate.

It is undeniable that the rigorous search and seizure procedure at airports has been successful. In the calendar year 1977, no fewer than 2534 handguns and other firearms were seized from passengers boarding airplanes.[1] It is impossible to estimate the number of passengers who otherwise would have carried handguns on an aircraft, absent the effective search methods at U.S. airports, but surely it is much larger than the number of weapons actually found.

And the new procedures have drastically reduced successful airplane hijackings in the United States and even the number of attempts in the last seven years. In other words, effective search and seizure has been proved to reduce crime with handguns. In contrast, the exclusionary rule as a deterrent to police illegal searches is a demonstrated failure; the number of crimes and the number of searches ruled invalid are steadily increasing. *M. R. W.*

1. Federal Aviation Administration, SEMI-ANNUAL REPORT TO CONGRESS ON EFFECTIVENESS OF THE CIVIL AVIATION SECURITY PROGRAM (1978) (Exhibit H).

meaningful. Policemen traditionally are not wealthy and the government has a deep purse. Moreover, higher administrative officials and irate taxpayers may be expected to react adversely to losses resulting from the misconduct of policemen and to do something about their training and exercise of responsibilities.

External control

When a prosecutor tries a defendant in the wake of a violation of Fourth Amendment rights, the court could conduct a "mini-trial" of the offending officer after the violation is alleged and proof outlined in the principal criminal case. This mini-trial would be similar to a hearing on a motion to suppress now, but it would be conducted after the main criminal case. The burden would be on the injured party to prove, by preponderance of the evidence, that the officer violated his Fourth Amendment rights. The policeman could submit his case to either the judge or the jury who heard the main criminal case.

By initiating the "trial" of the officer immediately following the criminal case in which he was charged with misconduct, the court could determine the question of his violation speedily and economically. Presumably both the judge and jury have been thoroughly familiarized with the facts of the main case and are able to put the conduct of the officer in perspective.

Such a mini-trial would provide an outside disciplinary force that the injured party could utilize in lieu of internal discipline by the agency. Any previous administrative action taken against the officer would be considered by the judge and jury, if a penalty were to be assessed as a result of the mini-trial. The same factors bearing on the penalty to the officer and compensation to the injured party as discussed under the administrative remedy would be relevant in the "mini-trial."

In those instances where police violate Fourth Amendment rights but the prosecutor does not bring charges against the suspect, the wronged party should be able to bring a statutory civil action against the government and the officer. Both would be named as defendants: the officer to defend against any individual penalty, the government to be able to respond adequately in damages to the injured party if such were found. Many instances of Fourth Amendment violation now go unnoticed because no criminal charge is brought and the injured party is not in position to bring a *Bivens*-type suit for the alleged constitutional violation. The burden of proof on the factors in regard to penalty and compensation would be the same as in a mini-trial following the principal criminal case, as discussed above.

Once the main trial is over, the court could conduct a second inquiry to discover whether the police had violated the defendant's rights.

The creation of this civil remedy could be accomplished by simple amendment to the present Federal Tort Claims Act. This is the procedure followed in many other countries, among them Canada.

> . . . the remedy in tort has proved reasonably effective; Canadian juries are quick to resent illegal activity on the part of the police and to express that resentment by a proportionate judgment for damages.[51]

Disciplinary punishment and civil penalties directly against the erring officer involved would certainly provide a far more effective deterrent than the Supreme Court has created in the exclusionary rule. The creation of a civil remedy for violations of privacy, whether or not the invasion resulted in a criminal prosecution, would provide a

51. Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 J. CRIM. L.C. AND P.S. 271 (1961), in POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE, Part II, THE EXCLUSIONARY RULE, *supra* n. 3, at 105.

remedy for the innocent victims of Fourth Amendment violations which the exclusionary rule has never pretended to give. And the rationale that the "government should not 'profit' from its own agent's misconduct" would disappear completely if erring officers were punished and injured parties compensated when there was a Fourth Amendment violation.[52] If such a law and procedure were enforced, there would be no remaining objection to the subject of search and seizure still receiving his appropriate punishment for his crime.

Both judges who favor the rule and those who oppose it have said that the rule itself is not mandated by the Constitution.

Conclusion

All of the above was written before I read Professor Kamisar's "Reply to critics of the exclusionary rule" in the August issue [Yale Kamisar, "Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?" 62 Judicature 66.] It is apparent that our respective positions are widely divergent. After pondering his statement, I believe it fair to say that he must attempt to defend his position on one of two grounds, and that on analysis neither is defensible.

First, if Professor Kamisar believes that the Fourth Amendment necessarily mandates the exclusionary rule, then he ought to cite Supreme Court authority for this position. Nowhere in his article does he do so. It is undeniable that at no time in the Court's history has a majority in any case ever so held, and I do not believe that any more than two individual justices in the court's history have so expressed themselves. In contrast, numerous justices, both favoring and opposing the rule, have stated that the rule itself is *not* mandated by the Fourth Amendment.

Second, if Professor Kamisar's article is intended only to say that under the Constitution we have a choice of methods to enforce the ban against "unreasonable searches and seizures," and that the exclusionary rule is a good choice only because of "the imperative of judicial integrity," then I submit both logic and experience in this country and all other countries refutes this. If the Supreme Court or the Congress has a choice of methods under the Constitution, then it simply will not do to rest the choice of the exclusionary rule solely on the high principle of "judicial integrity" and to ignore the pragmatic result, the failure to achieve the objective of enforcement and the other pernicious side effects discussed above, which themselves strongly discredit judicial integrity.

If we have a choice, to attempt to justify the continuation of the exclusionary rule on this basis is to be stubbornly blind to 65 years of experience. If we have a choice, to insist on continuing a method of enforcement with as many demonstrated faults as the exclusionary rule is to be blindly stubborn. If we have a choice, let us calmly and carefully consider the available alternatives, draw upon the experience of other nations with systems of justice similar to our own, and by abolishing the rule permit in laboratories of our 51 jurisdictions the experimentation with various possible alternatives promising far more than the now discredited exclusionary rule. □

52. McGowan, *Rulemaking and the Police*, 70 MICH. L. REV. 659, 692 (1972). "What Linkletter does appear to establish is that, at least when the cornerstone of deterrence is removed, the Fourth Amendment exclusionary rule does not rest upon an unshakeable foundation. . . . What does seem clear is that so ethereal a concept as the 'imperative of judicial integrity' does not, without more, mandate either admission or exclusion of reliable evidence improperly come by."

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The exclusionary rule: have critics proven that it doesn't deter police?

by Bradley Canon

Editor's note: Since last August, Judicature has published three widely-read discussions on whether the courts should retain the exclusionary rule, which requires judges to suppress evidence that police obtained through an illegal search.

Professor Yale Kamisar initiated the debate last August ("Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?") and U.S. Circuit Judge Malcolm Wilkey gave his response in November ("The exclusionary rule: why suppress valid evidence?"). Both men made their closing arguments last month.

Now two social scientists will discuss a key question in the debate: does the rule really deter police from making illegal searches? Bradley Canon argues that the evidence is inconclusive; in some cities, the rule deters; in others, it doesn't. Steven Schlesinger responds that the rule's proponents bear the burden of proving that it is effective—and they have not provided such proof.

Judge Malcolm Wilkey attacks the exclusionary rule in search and seizure in terms of both logic and experience. I will leave the logical arguments to others; my purpose here is to evaluate his claims that experience proves that the rule is socially costly and that it fails to achieve its purpose of securing police compliance with the Fourth Amendment.

According to Wilkey a variety of crimes would be significantly curtailed if the rule did not exist: gambling, narcotics, prostitution, armed robbery and concealed weapons.[1] No evidence, however, is offered in support of this assertion. Indeed, it is hard to see even a logical connection between the rule and the incidence of some of the crimes. Armed robbery is certainly far more a product of a society whose public policy (the only one in the civilized world, I might add) allows almost unrestricted access to weap-

1. Malcolm Richard Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 JUDICATURE 215 (November 1978).

ons rather than the legal inability of the police to search for guns in the few minutes before the crime occurs.

Moreover, the exclusionary rule in no way prevents the police from confiscating concealed weapons.[2] The real problem is not that criminals walk down the streets with bulging automatics in their coats or submachine guns thinly covered by blankets. The problem is that the weapons are well hidden and the police often do not know whom to search. Though reading Dick Tracy may suggest otherwise, criminals do not come in malformed, misshapen sizes rendering them easily identifiable to the police. Getting rid of the exclusionary rule would not alter the situation very much (unless, of course, the police adopted a policy of searching *everyone* randomly—in which case we would truly be living in a police state).

The impact of Mapp

Indeed, taking Wilkey's argument to its logical conclusion, one would have to believe that we lived in a rather crime-free society before *Mapp* v. *Ohio* in 1961.[3] This of course is hardly the case. It was in the 1920's and 1930's, not the 1970's that Dillinger, Capone and other gangsters walked the streets carrying violin cases. It was in the 1950's, not the 1970's, when organized crime's involvement in gambling became so notorious that the Kefauver Committee made headlines for months investigating it. I argue not that there is less crime today than there was before *Mapp*, but Judge Wilkey's assertion that the incidence of crime is *related to* the exclusionary rule fails to withstand even the most modest scrutiny.

In this vein, in fact, I find it amazing that Wilkey imputes to criminals a detailed knowledge of the law of search and seizure. ("Criminals," he writes, "know the difficulties of the police in making a valid search which will stand up under challenge at trial."[4] No evidence is offered that criminals are so learned in the law and it seems quite anomalous to assume so, considering that search and seizure law is so confusing or uncertain that the nation's most prominent jurists and legal scholars have described it as a "quagmire,"[5] a "no man's land"[6] and a "course of true law [that] has not run smooth."[7]

Ironically, Chief Justice Burger, a staunch opponent of the exclusionary rule, argues that one of its disadvantages is that *policemen* do not understand the intricacies of search and seizure law and thus often make mistakes in search situations.[8] He may well be right on this point, but if so Judge Wilkey's imputation seems all the more surprising. It takes more credulity than I have to believe that the basic problem is one of "smart crooks" and "dumb cops."

A differential impact

My main concern with Judge Wilkey's article, however, is not a fear that readers will be taken in by his exaggerated or unsound claims about the responsibility of the exclusionary rule for the high incidence of crime nowadays. Most readers, I am confident, have sufficient judgment to discount such claims. My concern, rather, is that they will accept the judge's assertion that empirical studies demonstrate that the rule is ineffective in deterring police violations of the Fourth Amendment. After all, they might reason, Wilkey is not reporting his own observations or conclusions here, but is merely citing studies carried out by others.

The problem is that Judge Wilkey's treatment of these studies leaves much to be desired. It seems that he relies in large part on the summaries of these studies and conclusions drawn from them by Professor Steven Schlesinger in his recent monograph on the rule.[9] Schlesinger is quite open in his

2. Judge Wilkey fails to recognize this point in his discussion of the exclusionary rule and gun control, *id.*, at 224-225.

3. 367 U.S. 643 (1961).

4. Wilkey, *supra* n. 1, at 224.

5. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. LAW BULL. 9 (1972).

6. Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474 (1961).

7. Frankfurter, J., concurring in Chapman v. U.S., 365 U.S. 610, 618 (1961).

8. Dissenting in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, at 417 (1976).

9. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE, New York: Dekker, 1977.

hostility to the exclusionary rule and, unfortunately, this has led him to misinterpret some studies and downplay others. Moreover, additional evidence has become available after Schlesinger's work was published.

When the totality of the evidence is examined more fully and more dispassionately, it does not support the Wilkey-Schlesinger conclusion that the rule is inefficacious in curbing illegal police searches. Neither, I should make it clear, does the evidence support the opposite conclusion—that the rule deters police illegalities nearly 100 per cent of the time. Put shortly, the rule has a differential impact depending upon time and place.

Replicating the Oak's study

Let us take a hard look at the empirical evidence. Wilkey argues that Dallin Oaks' study[10] is the "most comprehensive study ever undertaken"[11] on the subject. But Oaks' own research is devoted chiefly to drawing inferences about police behavior in Cincinnati from arrest records in search and seizure type crimes (largely gambling, narcotics, and weapons offenses) in the five or six years before and after *Mapp*.[12] It is a careful study and there is little doubt that the rule had only minimal impact on police behavior in Cincinnati immediately following *Mapp*. But it can hardly be considered comprehensive.

Few would be so bold as to join Judge Wilkey in claiming that police behavior in one city 15 years ago is representative of police behavior throughout the United States in 1978. Oaks himself freely admits that his study "obviously falls short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule."[13] Indeed, Wilkey puts words in Oaks' mouth when he tells us that "Oaks concluded" that the exclusionary rule is a failure;[14] Oaks took pains to note that this assertion "is an argument, not a conclusion."[15]

Working on a Ford Foundation grant in 1972-73, I replicated Oaks' Cincinnati study for 19 other American cities.[16] Statistical techniques were used to eliminate arbitrary judgments and control for alternate explanations. In nine of the cities, there was a statistically significant decrease in arrests in all or most search and seizure crimes following *Mapp*, while in the other 10 the impact was minimal or absent.[17]

Seemingly the exclusionary rule can and does have a very real, although hardly universal deterrent, effect on the police. The rule's impact, I concluded, depended much on such factors as degree of professional training prevailing in a department, policies of chiefs of police and squad commanders, the attitudes of mayors, city councils and other officials, etc. There simply was no singular response (or non-response) pattern to the exclusionary rule in the five or six years after *Mapp*.

Other studies

Schlesinger also briefly discusses Michael Ban's study of the use of search warrants in Cincinnati and Boston[18] and the Columbia Law School study of narcotics arrests in Manhattan following *Mapp*.[19] Ban found the annual use of search warrants rose from virtually zero to over 100 in Cincinnati

10. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

11. Wilkey, *supra* n. 1, at 222.

12. Oaks also collected data on the frequency of motions to suppress evidence in Chicago and Washington. The former data were used by Spiotto, *infra* n. 35, and will be discussed at some length later. The Washington data offer no support for a claim that the police continued to violate the Fourth Amendment after *Mapp*.

13. Oaks, *supra* n. 10, at 709.

14. Wilkey, *supra* n. 1, at 222.

15. Oaks, *supra* n. 10, at 755.

16. The results are reported in Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977). A preliminary and less methodologically oriented report is found in Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against Premature Conclusions*, 62 KY. L.J. 681 (1974). I rely on the former in the above discussion as it is more rigorous and corrects some errors appearing in the earlier article.

17. Canon, *Testing the Effectiveness* . . . , *supra* n. 16, at 72, Table 2.

18. Ban, "The Impact of Mapp v. Ohio on Police Behavior" (paper delivered at Midwest Political Science Association, May, 1973).

19. Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 1 COL. J.L. & SOC. PROBS. 87 (1968); Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhattan Police Practices, 1960-62*, 4 CRIM. L. BULL. 549 (1968).

while in Boston it went from about 100 to nearly 1,000.[20] He argued the Cincinnati figures are too low to represent wholehearted compliance with the Fourth Amendment—a conclusion that dovetails well with Oaks' Cincinnati findings. On the other hand, Ban concedes the Boston figures imply considerable if begrudging police compliance.

The Columbia study noted a dramatic decline in narcotics arrests in premises but only a slight decline of street arrests. The authors conclude that *Mapp* inhibited police from illegal invasion of homes, etc., but not from street searches. They also speculate that this was partly due to the vice squad's (which conducts raids on premises) greater awareness of the decision and its implications. Again, these studies demonstrate the differential impact of the exclusionary rule; they hardly lend support to Judge Wilkey's claims that the empirical evidence shows the rule to be a "total failure in its primary task of deterring illegal police activity."[21]

The data involved in the above studies have one common feature: they come from the period immediately following the *Mapp* decision. However, in evaluating the exclusionary rule with an eye toward a public policy decision of retention, modification or abrogation, we should be interested in its present rather than its past impact on police behavior. Unless we can be reasonably sure that the impact reported in the early 1960's persists without great change into the present, the value of the above studies is quite limited. And while the data are thin and inferences tenuous, there is some reason to believe that the rule has become more effective than it was in the early 1960's.

A recent survey

In 1973 I sent questionnaires to police departments, prosecutors and public defenders in all American cities with populations of more than 100,000.[22] I asked whether their current search and seizure practices differed from those prevalent in 1967 and, if so, how. Responses came from over half the cities and clearly indicated that in most of them police compliance with the Fourth Amendment increased significantly over the six year period.

- Four-fifths of them reported the use of search warrants was more than 50 per cent greater than the 1967 level and 35 per cent of the cities reported an increase of more than 100 per cent.[23]
- Nearly two-thirds of the departments reported more restrictive policies pertaining to searches accompanying an arrest than they espoused six years earlier;[24] 18 per cent reported a stricter policy regarding searches of automobiles.[25]
- Moreover, while comparison with 1967 figures showed only modest change, 50 per cent of the cities reported that motions to suppress evidence were granted less than 10 per cent of the time[26] and in 63 per cent it was reported that charges were "rarely" dropped because of illegal seizure of the evidence.[27]

Even in the absence of the above data, one could reasonably surmise on the basis of impact patterns reported for other Supreme Court criminal justice decisions that the exclusionary rule is more effective now than it was in the immediate post-*Mapp* years. The controversial *Miranda* decision,[28] for instance, received only spotty compliance by police departments in the two or three years after its promulgation.[29] More recently, however, it seems to be effective in controlling police behavior—and even has won the approval of many officers.[30] And immediately following *In re Gault*[31] compliance

20. Ban, *supra* n. 18, at 7, Table 1.
21. Wilkey, *supra* n. 1, at 222.
22. The results are reported in Canon, *Is the Exclusionary Rule . . ., supra* n. 16.
23. *Id.*, at 712, Table 6.
24. *Id.*, at 715, Table 8.
25. *Id.*, at 719, Table 9.
26. *Id.*, at 722, Table 10.
27. *Id.*, at 724, Table 11.
28. Miranda v. Arizona, 384 U.S. 436 (1966).
29. Wald, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967); Medalie, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).
30. Wasby, SMALL TOWN POLICE AND THE SUPREME COURT. Lexington, Massachusetts: D.C. Heath, 1976, *passim*; Cannon, *Confessions and Right to Counsel: The Impact of Miranda in Missouri*, 17 ST. LOUIS U. L.J. 572 (1973).
31. 387 U.S. 1 (1967).

was a hit and miss affair; many juvenile judges did not seem to know that such a decision had even been made.[32] Again, a decade's time has permitted the word to circulate and eroded resistance.[33]

Experience tells us that sudden and dramatic changes in policy such as occurred with the *Mapp* decision do not produce alterations in behavior overnight. Information about Supreme Court decisions is particularly poorly disseminated, often easily misunderstood and sometimes ignored in deference to habit or convenience.[34] But eventually the word is spread; young, professionally trained recruits infuse the ranks; old-timers become a vanishing breed. It is not certain, of course, that police search and seizure behavior has followed this scenario, but it is certainly a plausible hypothesis.

Spiotto's study

The only other empirical evidence Judge Wilkey discusses is James Spiotto's study comparing results of a study of motions to suppress in search and seizure crimes in the Chicago Municipal Court in 1950 with those in 1969 and 1971.[35] Wilkey makes much of the findings and quotes Spiotto as follows:

> over a twenty year period in Chicago, the proportional number of motions to suppress evidence [in narcotics and weapons cases] allegedly obtained illegally increased significantly. This

the opposite result of what would be expected if the rule had been efficacious in deterring police misconduct.[36]

This is an amazing conclusion. Spiotto is utterly unaware that Illinois adopted the exclusionary rule in 1924[37]—some 37 years before *Mapp*. (Besides being a legal researcher, Spiotto is an Illinois resident, so it is not easy to explain this monumental error.)[38] Thus the court was governed by the rule in 1951 as well as in 1969 and 1971 and the *Mapp* decision would have no legal impact on its receptivity to motions to suppress.

It could be argued—although it is not a point made by either Spiotto or Wilkey—that *Mapp* had an impact even in those states which had previously adopted the rule because federal civil liberties decisions have a greater visibility than those made by states or because police officers have reason to believe that state judges do not take such decisions seriously while federal judges do. This may be true in some jurisdictions,[39] but it is obviously not the case in Chicago. Its court was clearly enforcing the exclusionary rule prior to *Mapp*; the 1950 study shows that 98 per cent of all motions to suppress were granted.[40]

Even if Illinois had not adopted the rule long before *Mapp*, Spiotto's conclusion about the rule's inefficacy would be flawed. After all, if there were no exclusionary rule, there would be no point in defendants moving to suppress evidence (such motions would obviously be denied) and consequently there would be few such motions filed and none granted. Thus it would be

32. Lefstein, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 L. & SOC. REV. 491 (1969); Canon and Kolson, *Rural Compliance With Gault: Kentucky, A Case Study*, 10 J. FAMILY L. 300 (1971).

33. In the spring of 1975, my graduate seminar at the University of Kentucky replicated the study reported in Canon and Kolson, *supra* n. 32. The results clearly demonstrated a much higher knowledge of and compliance with Gault by the state's juvenile judges than was the case in 1969.

34. Dolbeare and Hammond, THE SCHOOL PRAYER DECISION: FROM COURT POLICY TO LOCAL PRACTICE, Chicago, University of Chicago Press, 1971. Wasby, *The Communication of the Supreme Court's Criminal Procedures Decisions: A Preliminary Mappiace*, 18 VILL. L. REV. 1083 (1973).

35. The data is reported in Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEG. STUDIES 243 (1973). Spiotto also discussed it in *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 11 POLICE SCI. & ADMIN. 36 (1973). The 1950 study is reported in Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 17 NW. L. REV. 1934 (1952). The 1969 data is discussed in Oaks, *supra* n. 10.

36. *The Search and Seizure Problem . . .*, *supra* n. 35, at 47 (cited by Wilkey, *supra* n. 1, at 222-223).

37. People v. Castree, 143 N.E. 112 (1924).

38. It is not absolutely clear from the above quotation that Spiotto is unaware of Illinois' earlier adoption of the rule. However, at another point, Spiotto makes his ignorance on the point quite plain. *See, Search and Seizure: An Empirical Study . . .*, *supra* n. 35, at 276, where he says, "As pointed out earlier in this study, during the period 1950-1970, *in the course of which the exclusionary rule was introduced in Illinois*, . . ." (emphasis added).

39. I explore this hypothesis in Canon, *Testing the Effectiveness . . .*, *supra* n. 10. The aggregate evidence lends it some support.

40. Spiotto, *Search and Seizure: An Empirical Study . . .*, *supra* n. 35, at 247, Table 1.

perfectly natural that the porportion of such motions granted would rise dramatically after the *Mapp* decision when judges would be constitutionally obligated to consider them seriously and grant those with merit. The "significant increase" Spiotto reports would tell us nothing about the impact of the rule on police conduct; it would speak only of the perfectly obvious impact of the rule on the conduct of *defense attorneys*.[41]

Finally, it might be argued that regardless of when the exclusionary rule was adopted, the percentage of motions to suppress is much too high—running 69 per cent in 1950 and in the 30 per cent to 35 per cent range in the 1969-71 period[42]—and that this in itself is damning evidence of the rule's ineffectiveness. Chicago, however, is not a very typical city in this respect. As previously noted, in three-fifths of large American cities, 10 per cent or fewer of such motions are granted and in only a handful were over 25 per cent of such motions granted.[43] Indeed, Chicago police are reputed to enforce the vice laws in a manner which insures that motions to suppress will be successful.[44] Thus they have their cake and eat it too by appearing to engage in vigorous enforcement activity and yet refraining from seriously endangering the continued existence of organized vice.

Existing data make it impossible to establish a universal conclusion—either "yes, it works" or "no, it doesn't work."

Conclusion

In summary, Spiotto's study of motions to suppress sheds no light at all on the efficacy of the exclusionary rule. It is highly unfortunate that both Professor Schlesinger and Judge Wilkey place so much reliance on it. The endorsement of the badly flawed study by persons in such positions lends it undeserving credibility among readers unfamiliar with the subject. That Wilkey and Schlesinger rely on Spiotto's so-called conclusions so eagerly is (especially in Schlesinger's case, as he is a social scientist presumably experienced in the analysis of data) yet another attestation to the ever present human tendency to grasp at any straw in order to promote values and beliefs already adopted.

None of the above is meant to suggest that the exclusionary rule is or inevitably will be largely effective in securing police compliance with the Fourth Amendment. What it is, simply, is a refutation of repeated assertions and implications that the rule is ineffective in deterring police misconduct. Existing data at the present time make it impossible to establish empirically a universal "yes, it works" or a "no, it doesn't work" conclusion—or even anything approximating such a conclusion.

Judge Wilkey, Professor Schlesinger and others have every right to disagree with the exclusionary rule; certainly there are reasoned arguments which can be advanced against it independent of an empirical one. But what they do not have a right to do is to disseminate a myth that empirical studies show that the issue has been resolved negatively. To the degree that empirical studies of its impact bear on the decision to retain, modify or abandon the rule, the public—and the decision-makers—are entitled to facts, not myths. □

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41. Oaks agrees with this point, *supra* n. 10, at 713-14.

42. Spiotto, *Search and Seizure: An Empirical Study . . .*, *supra* n. 35, at 247, Table 1.

43. Canon, *Is the Exclusionary Rule . . .*, *supra* n. 16, at 722, Table 10. See the discussion surrounding n. 26, *supra*.

44. *See* Comment, *supra* n. 35, and LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 MO. L. REV. 391, at 423 (1965).

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See the following article for an opposing view.

10 impact
Americans for Effective Law Enforcement

LEGISLATIVE REFORM OF THE EXCLUSIONARY RULE: THE GOOD FAITH EXCEPTION

In 1961 the U.S. Supreme Court held, in a 5-to-4 decision, that "illegally seized" evidence was no longer admissible in criminal cases prosecuted by state officials. The ruling was surprising and is not followed in any other country. The principal purpose of the rule is to deter and punish police "misconduct" or disregard of the Fourth Amendment.

No one would seriously urge that police officers should be free to deliberately violate the Constitution in order to secure a conviction, and this aspect of the "Exclusionary Rule" is not really in debate, although some scholars have suggested different methods to deter and punish police misbehavior.

The principal fault of the Exclusionary Rule, as it is presently interpreted, is that it also punishes a **good faith mistake** by an honest and conscientious police officer. The "mistake" might be an inadvertent one, such as the wrong date on the affidavit, or an "incomplete" description of the premises to be searched or the property to be seized.

The Good Faith Exception

In 1980, an en banc federal appeals court was the first to recognize an exception to the Exclusionary Rule. In **United States v. Williams**, the Fifth Circuit said that:

Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence. 622 F. 2d 830, 846-7.

The Fifth Circuit noted that the officer's **subjective** beliefs concerning the legality of a search is not enough. Ignorance of the basic principles of criminal procedure fails the **objective** test of good faith. The police officer's actions must "be based upon articuable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." This language places heavy emphasis on the quantity and quality of police training. Future cases in that circuit will examine the preservice training given recruits, in-service training given seasoned officers, and case law bulletins furnished officers on a periodic basis. There will be a strong incentive to insure that all officers are promptly provided with the latest case law affecting police operations.

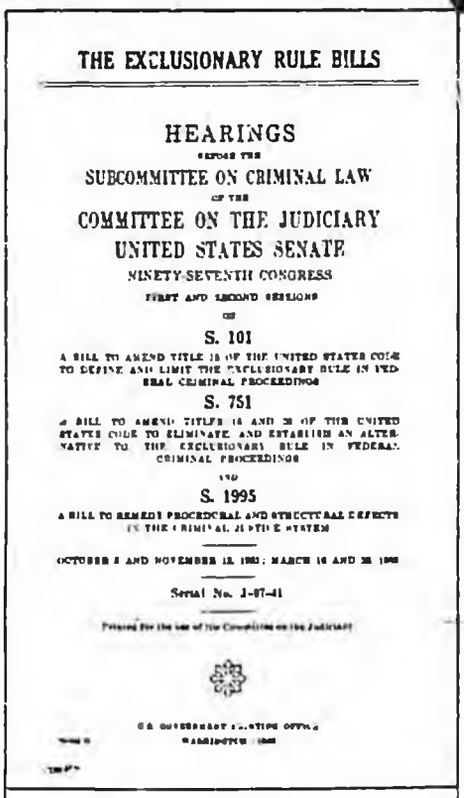
The Fifth Circuit was split into the Fifth and Eleventh Circuits in 1981; the **Williams** decision is now the law in both circuits. The Supreme Court declined to review the **Williams** decision, and has yet to express an opinion on the good faith exception in search and seizure cases. Assuming an appropriate factual setting, many scholars believe the Supreme Court will eventually adopt a good faith exception, at least by a 5-to-4 majority. A properly worded statute could narrowly frame the issues.

Americans for Effective Law Enforcement, Inc. (AELE) has been an outspoken proponent for the good faith exception. AELE originally urged its views at the Attorney General's Task Force on Violent Crime hearings in 1981. The Task Force later recommended adoption of the good faith exception.

Following the Task Force recommendation, several U.S. Senators introduced bills which would extend the good faith exception to the other ten federal appeals circuits. The present administration has strongly supported such legislation, and a variety of organizations and witnesses (including AELE) have filed position papers and have testified in support of modification proposals.

On June 2, 1982, the head of the Justice Department's Criminal Division, D. Lowell Jensen, noted that the Exclusionary Rule is not required by the Constitution, but is only a court-ordered remedy to deter police misconduct. The Justice Department points out that no conceivable purpose is served by suppressing evidence which has been seized in good faith. In short, there is no reason to "punish" the police and no deliberate

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THE EXCLUSIONARY RULE BILLS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAW

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S. 101

A BILL TO AMEND TITLE 18 OF THE UNITED STATES CODE TO DEFINE AND LIMIT THE EXCLUSIONARY RULE IN FEDERAL CRIMINAL PROCEEDINGS

S. 751

A BILL TO AMEND TITLES 18 AND 28 OF THE UNITED STATES CODE TO ELIMINATE AND ESTABLISH AN ALTERNATIVE TO THE EXCLUSIONARY RULE IN FEDERAL CRIMINAL PROCEEDINGS

AND

S. 1995

A BILL TO REMEDY PROCEDURAL AND STRUCTURAL DEFECTS IN THE CRIMINAL JUSTICE SYSTEM

OCTOBER 8 AND NOVEMBER 12, 1981; MARCH 16 AND 26, 1982

Serial No. J-97-41

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON, 1982

AELE POSITION HEARD IN U.S. SENATE EXCLUSIONARY RULE HEARINGS

Wayne W. Schmidt, AELE Executive Director, testified on March 16, 1982, before the Subcommittee on Criminal Law of the Senate Judiciary Committee. The invitation to present our views came from the chairman, Senator Charles Mathias of Maryland. Several bills would modify the harsh effects of the evidentiary rule that now prohibits federal courts from considering evidence that has been "illegally" obtained by police or federal agents.

At heart is the so-called "Good Faith Exception" to the rule. The exception was only recently recognized by the federal appeals court that supervises lower level courts in six southern states. Schmidt stated that there is no evidence that officers have abused the good faith test in those states. He pointed to Houston, which averages nearly 100 criminal filings a month. In more than a year, not a single case of police misuse of the good faith exception has been noted. Statistics were also cited for Miami, and again no police abuse has even been alleged.

The Senate Hearings have recently been printed; the paper-bound book is 837 pages in length. The report contains statements by Committee members of the Senate, testimony of the various witnesses, proposed legislation, prepared statements, supplemental questions and answers transmitted, correspondence, articles and comments received. The report, Serial No. J-97-41, as pictured above, may be obtained from your U.S. Senator.

continued from page 1

misconduct to "deter." The Senate has yet to act on S. 2231, which is the bill currently supported by the administration.

State Response

Colorado was the first state to act, and passed House Bill No. 1493, which recognizes a good faith exception in state prosecutions [Colo. Rev. Stat. §16-3-308 (1981 Session)]. The bill was co-sponsored by 33 representatives and 8 senators; the governor signed the bill into law, and the act took effect on July 1, 1981.

Arizona was the second state to enact a good faith statute, House Bill 2106. What is now Ariz. Rev. Stat. 13-3925 was signed by the governor on April 20, 1982. In June, a nationally advertised conference and seminar on the good faith exception was held in suburban Phoenix. In addition to Arizona registrants, prosecutors from 14 other states attended the discussion sessions. AELE participated in this conference, and began work on a Model State Statute.

Model State Statute

In July 1982, Americans for Effective Law Enforcement proposed a Model State Statute, which is set forth in the box on page 3. Sections A and B closely follow the recent Arizona statute. The remaining sections were drafted to reflect the views of many of the attendants at the Phoenix conference; that such statutes give the courts as much direction and as little discretion as possible.

Good faith is specifically defined. Of particular interest is the section relating to warrantless searches (D-2). The officer must possess, in addition to his subjective belief that he has probable cause, "at least a reasonable suspicion" that the person possesses, or that the premises contains items of an evidentiary nature.

Reasonable suspicion is a standard of proof which has been determined in over five thousand published court opinions. It is the same quantum of proof necessary to justify a temporary detention of an individual under the "stop-and-frisk" doctrine recognized by the Supreme Court in 1968. It is an articulate standard in each state, based on thousands of situations. It is a standard of less than probable cause, but greater than intuition, hunch or a suspicion not premised on objective facts.

Another component of the Model State Statute is a training requirement. It will vary from state to state, and presumably each state training board will continually evaluate local training needs in search and seizure cases.

Constitutional Action Required in Some States

In a few states, like Florida and Louisiana, the Exclusionary Rule is a part of their state constitution. A constitutional amendment will be required in those jurisdictions; such an amendment was narrowly defeated in Florida in 1982, but will be re-introduced later.

In some jurisdictions, the state supreme court has adopted the principle of "independent state grounds" and refuses to admit certain evidence in state prosecutions, although that same evidence is admissible in the federal courts. California is such a jurisdiction, and citizen-supported attempts to end this judicial variance are now pending, through the initiative process.

Public Support for Truth in Evidence

The majority of Americans are law-abiding and are understandably frightened at the rising crime rate. They are dissatisfied with the criminal justice system and are frustrated that criminals are freed due to a "technical" violation of the Fourth Amendment. For example, California Assemblyman Robert Naylor recently polled his constituents in San Mateo County (the peninsula just south of San Francisco). Over 6,000 voters responded to a questionnaire; an overwhelming 80 percent of the respondents felt that evidence of guilt should not be excluded from a trial even if it

...ntinued from page 2

was not gathered consistent with court-prescribed procedures.

Focus on the Real Issues

Civil libertarians warn of wholesale police abuse of any good faith exception to the Exclusionary Rule. Visions of police harrassment of innocent persons in their homes at 3:00 a.m., however dramatic, are not in issue. The "real" issue is the good faith mistake of a professionally trained officer, or an unnoticed minor error, or the retroactive effect of an overturned court precedent, or even a 3-to-2 decision that a particular law or procedure is "unconstitutional." Defense attorneys, who sometimes constitute the largest group of state legislators, have a vested interest in perpetuating the status quo.

The real goal of criminal justice should be the encouragement of professional law enforcement and to obtain convictions of the guilty. A search for technicalities does not further that end. The good faith exception, however, encourages police professionalism and still punishes intentional misconduct or an indifferent attitude to the rights of society. Good faith legislation is the modification of a rigid rule that in no way affects its principal purpose.

AELE's Position Urged

In his Senate testimony, AELE Executive Director Wayne Schmidt urged "the Congress as well as the courts, to adopt a 'Good Faith Exception' to the exclusionary rule." Minority Senator Dennis DeConcini, an author of one of the Good Faith bills, suggested that Congressional action would signal the states to adopt similar legislation. Perhaps it will be the other way around, which is why AELE has adopted a Model State Statute.

AELE members and supporters will be pleased to hear we have mailed this issue of **Impact** to 7363 state legislators and 530 Members of Congress. Let your representatives and senators know your views.

AELE MODEL STATE STATUTE*

Exclusionary Rule Limitations: Admissibility of evidence obtained as a result of an unlawful search or seizure.

A. If a party in a proceeding, whether civil or criminal, seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible.

B. No court shall suppress evidence which is otherwise admissible in a civil or criminal proceeding if the evidence was seized in good faith or as a result of a technical violation.

C. "Evidence" means contraband, instrumentalities or fruits of a crime, or any other evidence which tends to prove a fact in issue.

D. "Good faith" means whenever a peace officer obtains evidence:
   1. Pursuant to a search warrant obtained from a neutral and detached magistrate, which warrant is free from obvious defects other than non-deliberate errors in preparation and the officer reasonably believed the warrant to be valid; or
   2. Pursuant to a warrantless search, when:
      a. The officer reasonably believed he possessed probable cause to make the search, and
      b. The officer, possessed at least a reasonable suspicion that the person or premises searched, possessed or contained items of an evidentiary nature, and
      c. The officer reasonably believed there were circumstances excusing the procurement of a search warrant; or
   3. Pursuant to a search resulting from an arrest, when:
      a. The officer reasonably believed he possessed probable cause to make the arrest, and
      b. The officer reasonably believed there were circumstances excusing the procurement of an arrest warrant, or
      c. The officer procured or executed an invalid arrest warrant he reasonably believed to be valid; or
   4. Pursuant to a statute, local ordinance, judicial precedent or court rule which is later declared unconstitutional or otherwise invalidated; and
   5. The officer has completed a law enforcement academy or other approved prerequisite curriculum and any mandatory subsequent training or instruction in Constitutional law and criminal procedure, where required by the [State Peace Officers' Standards and Training Commission].

E. This section shall not adversely affect the rights of any plaintiff to seek special damages against a peace officer or a governmental entity, provided that the trier of fact in such civil action determines that the officer or entity conducted an unlawful search or seizure.

F. [Appropriate savings and severability clause].

*Adopted by **Americans for Effective Law Enforcement, Inc.** July 14, 1982.

No. 81-430

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and
SUSAN GATES,

Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF OF AMICI CURIAE STATE OF FLORIDA, ET AL. ON REARGUMENT

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QUESTION PRESENTED

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment?

INTEREST OF AMICI CURIAE

The above-listed states, through their attorneys general, respectfully offer this brief in support of the State of Illinois. The amici will all be affected by the decision since this case involves the Fourth Amendment to the United States Constitution, made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961). Many of the amici have state constitutions which have been construed in the search and seizure context to be identical to the Fourth Amendment to the United States Constitution. Indeed, Florida's constitutional prohibition against unreasonable searches and seizures expressly states that:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

Fla. Const. of 1968, Art. I, § 12 (1982).

Additionally, three of the amici have legislatively provided a good faith exception to the exclusionary rule. See Utah Code Ann. §§ 78-16-1 through 11 (Interim Supp. 1982); Ariz. Rev. Stat. Ann. § 13-3925; Colo. Rev. Stat. § 16-3-308. Obviously, the ruling in this case will affect these amici, as well as those states contemplating similar legislation.

The Washington Legal Foundation (WLF) is a private non-profit corporation dedicated to the public's interest in reducing crime and its impact on society. WLF joins this brief because its members agree with the attorneys general of the various signatory states that the exclusionary rule no longer serves the purpose of police officer deterrence and that the exclusion of evidence without regard to the culpability of law enforcement personnel is in derogation of the rights of law-abiding citizens.

SUMMARY OF ARGUMENT

As the exclusionary rule is now rigidly applied, it no longer serves to deter police misconduct or foster the integrity of the judicial system. Instead, the rule benefits only those who break the law, and the Court should modify the rule to make its application more consistent with the original reasons for the rule.

Because it is impossible to deter police officers from doing acts which they do not know, should not know, or cannot know are illegal, evidence should not be excluded when police officers act with both a reasonable and good faith belief that their conduct is lawful.

However, in all cases in which a neutral and detached magistrate has issued a search warrant which commands or authorizes that law enforcement officers conduct a search, evidence should not be

excluded because there is no way that the purpose of the rule can be served. The judiciary has actively encouraged law enforcement officers to obtain warrants, and it is not prudent to punish society's effort to obtain justice, thus benefiting only the criminal, because a judicial officer has improperly or incorrectly issued a search warrant. Therefore, unless the warrant was obtained by fraud or was improperly executed, evidence should never be excluded once a neutral and detached magistrate has issued a search warrant.

THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE EXCLUSION OF EVIDENCE WOULD FAIL TO SERVE THE RULE'S PURPOSE OF DETERRING POLICE OFFICERS FROM MISCONDUCT.

The exclusionary rule is a judicially created procedural safeguard applied to the benefit of criminal defendants. In recent years, some of the current members of the Court, as well as hundreds of other judges throughout the country, have questioned the continued viability of the rule in light of how the rule has been followed without regard to the question of guilt or innocence or more importantly without regard to the original purpose of the rule. Schneckloth v. Bustamonte, 412 U.S. 218, 267, n.24 (1973) (Powell, J., concurring). The time has come when the Court can no longer ignore the encouragement that blind adherence to the exclusionary rule affords the ever expanding criminal

component of our society. The rule should be modified, and the time is now.

A.

THE EXCLUSIONARY RULE SHOULD BE MODIFIED BECAUSE IT HAS OUTLIVED ITS PURPOSE.

It is now well settled that the primary purpose of the exclusionary rule is to deter police conduct which violates the Fourth Amendment. Stone v. Powell, 428 U.S. 465, 486 (1976). However, it is equally well settled from the enormous amount of controversy about the manner in which the rule has been applied that the rule no longer serves its original purpose. See e.g., Brewer v. Williams, 430 U.S. 387, 422 (1977) (Burger, C.J., dissenting).

The amici curiae submit that as the rule is now rigidly applied, it serves almost exclusively to punish society's law-abiding citizens while benefiting criminals whom the rule was never intended to serve. Why should criminals go free

because "the constable has blundered"? People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.).

It should be beyond peradventure that justice should be a truth seeking process -- however, as the rule is now inflexibly applied, it fosters disrespect rather than enhancing the integrity of the judicial system which originally was a second reason for the rule. Stone v. Powell, supra at 428 U.S. 484. Thus, the rule is now causing precisely the same disrespect for the judicial process which it sought to eliminate!

As the rule is now applied, it does not distinguish between or among the extent of fourth amendment violations. Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., concurring in part). Instead, once it is determined after the fact that the Fourth Amendment has been abridged,

evidence is excluded without regard to the culpability of the officer who seized it. How can an officer be deterred from doing something he does not know is wrong? This defies common sense.

Moreover, because police officers are insulated from the actual exclusion decision (e.g., sequestered at the suppression hearing or removed by time and distance from an appellate exclusion of evidence), the purpose of police deterrence is defeated because officers may never learn how or why the evidence was excluded. Instead, law enforcement officers are likely to blame the judiciary, the prosecutor, or "the system," thus obliterating any chance of inspiring confidence in the judicial system, which was the second reason for the rule.

The frailty of the rule as it now exists can perhaps best be evidenced by the

swift, but where there have been two wrongs, the defendant's and an officer's, both will escape punishment. Dee Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 755 (1970). The present Administration has gone on record to support modification of the rule. Legislation to amend the judge-made exclusionary rule was pending at the close of the 97th Congress, and it is anticipated that similar legislation will be introduced during the 98th Congress.

A final reason that the exclusionary rule no longer serves its original purpose is that it discourages law enforcement officers from relying upon or following up citizen participation in crime prevention

across the country. A blanket application of the rule, as was done by the Illinois appellate courts in this case, serves only to deter law enforcement officers from using what might ultimately turn out to be accurate information, just because the initial citizen tip was found in an anonymous letter or telephone call. Cf. Adams v. Williams, 407 U.S. 143, 147 (1972). Unquestionably, as the rule is inflexibly applied now, in such cases only society and justice, not the criminal, are punished. The time is now for the Court to change this situation.

B.

EVIDENCE SHOULD NOT BE EXCLUDED WHEN IT WAS SEIZED BY A POLICE OFFICER WHO HAD A GOOD FAITH BELIEF SUPPORTED BY OBJECTIVE REASONABLE GROUNDS THAT HIS CONDUCT WAS LAWFUL.

While there has been widespread agreement among law enforcement officers, prosecutors, judges, and even some of the defense bar that there are problems with the application and enforcement of the exclusionary rule, the question remains what should be done to the rule itself or the manner in which it is applied. The amici curiae are not urging the Court to take the drastic step of abolishing the exclusionary rule altogether, but rather, the various states are asking the Court to modify the rule in a common sense fashion which would still accomplish the rule's original objectives.

The Court should adopt a [illegible] which eliminates the "all or nothing" rationale of the rule as it is now being applied. The amici submit that a better alternative would be a rule which would not order exclusion when the evidence was seized by a law enforcement officer acting in good faith with a reasonable belief supported by objective reasonable grounds that his conduct was lawful.

The Court has already adopted this type of approach in many varied situations involving evidence seized or obtained from improper searches and seizures. In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court upheld the admission of evidence which had been seized after an arrest which was later termed illegal only after the ordinance authorizing the arrest had been found unconstitutional. The Court recognized that "[a] prudent officer, in

the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional." Id. at 443 U.S. 37, 38. The Court noted that it was a police officer's duty to enforce laws until those laws are found unconstitutional, and the Court commented that society would suffer if police officers took it upon themselves to determine which laws were constitutionally entitled to enforcement. Id. at 443 U.S. 38.

In United States v. Peltier, 422 U.S. 531 (1975), a majority of the Court refused to apply the exclusionary rule to a border search when the statutory and regulatory authority for the search were found unconstitutional in a case that was decided long after the search had been conducted.

The Court specifically recognized that exclusion of evidence was not required when it would not serve the purpose of the rule because there had been absolutely no way for the law enforcement officers to know that their search was unconstitutional. Id. at 422 U.S. at 542.

Similarly, in Michigan v. Tucker, 417 U.S. 433, 447 (1974), a majority of the Court recognized that where police officers had acted "in complete good faith" the rule's deterrence rationale was not compelling enough to cause the exclusion of evidence even though the evidence had been indirectly obtained in violation of the Constitution because the defendant had not been Mirandized.

The Court has previously applied this same rationale in its retroactivity cases. In Linkletter v. Walker, 381 U.S. 618, 637 (1965), the Court refused to make

retroactive Mapp v. Ohio, 367 U.S. 643 (1961), which, of course, was the case which held that the exclusionary rule was applicable to the states in the first place. In Linkletter, the Court explicitly recognized that the application of the exclusionary rule retroactively "by the wholesale release of the guilty victims" [criminals] would not serve the rule's purpose of police officer deterrence. Id. at 381 U.S. 637. In other words, the Court implicitly recognized that police officers would not be deterred by the application of the rule at that late date because when their alleged "illegal conduct" had occurred, that conduct had not yet been judicially declared to be illegal. The rule was not applied retroactively because the reason for the rule would not have been served.

more recent case of United States v. Johnson, ___ U.S. ___, 73 L.Ed.2d 202 (1982). That case is consistent with the rationale supporting a good faith exception because in Johnson, law enforcement officers should have been on notice for at least one month that a warrantless arrest in a home was illegal in that jurisdiction. Id. at 73 L.Ed.2d 216, n.15. Thus, a law enforcement officer who made a warrantless arrest could not have had both a good faith and reasonable belief that his conduct was lawful, and consequently, a good faith exception could not be justified under those circumstances. Had that not been the case, this Court might well have reached a contrary conclusion. See Desist v. United States, 394 U.S. 244 (1969); United States v. Peltier, supra.

Moreover, the same practice of not applying the harsh sanctions of the rule in situations where the purpose of deterring police officer illegal conduct would not be served can be found in the Court's standing cases. For example, in Rakas v. Illinois, 439 U.S. 128, 134 (1978), the Court refused to apply the exclusionary rule to the benefit of defendants whose fourth amendment rights had not been violated. See also United States v. Payner, 447 U.S. 727, 735 (1980), in which the majority of the Court refused to allow the suppression of otherwise admissible evidence which had been seized unlawfully from a third party not before the Court. The Court emphasized that the interest of deterring illegal searches would not be served by exclusion of the evidence at the "instance of a party who was not the victim of the challenged practices." Id.

In a similar vein, the Court has not seen fit to apply the exclusionary rule in the context of impeachment of a defendant's testimony at trial. In United States v. Havens, 446 U.S. 620, 628 (1980), the Court held that the rule's interest in police deterrence was outweighed by society's interest in reaching the truth at trial, and the Court allowed the prosecution to impeach the defendant's testimony with illegally obtained evidence which was inadmissible in the government's direct case. See also Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971); and Walder v. United States, 347 U.S. 62 (1954).

Also, the exclusionary rule has not been applied in federal civil proceedings even though the evidence was seized in violation of the Constitution. In United States v. Janis, 428 U.S. 433, 455 (1976),

Justice Blackmun wrote that there was no justification for extending the exclusionary rule to a federal civil proceeding based upon evidence unlawfully seized by a law enforcement officer who had acted in good faith:

> In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. (Footnote omitted.)

Similarly, the rule has not been applied to grand jury proceedings. United States v. Calandra, 414 U.S. 338 (1974). The Court noted that any possible "minimal advance in the deterrence of police misconduct" was outweighed by society's interest in not hampering the role of the grand jury. Id. at 414 U.S. 351, 352.

Thus, it is clear that the Court has already recognized the problems with the rule and the wisdom of not applying the rule in situations in which alleged police misconduct would not be deterred. However, the Court has not yet taken that last step and ruled that evidence should not be suppressed when it was seized by a police officer who was acting in a reasonable good faith belief, supported by articulable objective grounds, that the search and seizure was lawful. This case presents such an opportunity.

The Fifth Circuit Court of Appeals, sitting en banc, has already adopted the same good faith standard which the amici curiae submit should be made law nationwide. United States v. Williams, 622 F.2d 839, 847 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981). The good faith exception to the exclusionary rule is

also the law in the Eleventh Circuit. Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

In Williams, the Fifth Circuit emphasized that it had modified the rule "only to conform that [the rule] to its underlying purpose: to deter unreasonable or bad-faith police conduct." Id. at 622 F.2d 847. The court also explained that the good faith exception would apply only if the officer's belief was both "bona fide and reasonable." Id. at 622 F.2d 843. Therefore, suppression would still result in cases in which the proponent of the evidence could not establish that the officer's belief was both in good faith and reasonable in light of the circumstances known to the officer at the time. In other words, the original purpose of the rule would still be served by exclusion of evidence in cases involving bad faith or

unreasonable conduct on the part of law enforcement officers.

The adoption of the good faith exception to the exclusionary rule by this Court would not be a decision which would strip unfortunate defendants of their constitutional rights. While protection against unreasonable searches and seizures may have its roots in the common law and, of course, the Constitution, the exclusion of evidence thus obtained is uniquely a product of the judicial system of the United States. Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, supra.

Moreover, practice in both the Fifth and Eleventh Circuits has conclusively demonstrated that the anguished outcries found in the rhetoric of those opposed to modifying the rule are unfounded. In fact, on March 16, 1982, the Senate Judiciary Subcommittee on Criminal Law heard

testimony on whether Congress should statutorily create a good faith exception to the exclusionary rule. Testimony before that Subcommittee established that there had been no abuses of the good faith exception to the exclusionary rule in either the Fifth or Eleventh Circuits as of that date.[1]

As Chief Justice Burger explained in his dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419, 422 (1971), a civil remedy against the offending officer would be more viable than the "universal 'capital punishment'" inflicted upon all illegally obtained evidence, regardless of

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[1]The Committee heard testimony that there had been 1,185 criminal filings in the Southern District of Texas, 119 criminal filings in the Southern District of Alabama, and 602 criminal filings in the Southern District of Florida. There was absolutely no empirical evidence or other type allegation that the good faith exception had been abused.

how it was obtained. Amici submit that police officer deterrence would be more likely to occur if offending officers (or their supervisors) were made civilly liable. In egregious cases, law enforcement officers would be much more likely to police their own since they would no longer be insulated from their conduct. See, e.g., Smith v. Hoath, 691 F.2d 220 (6th Cir. 1982), in which a supervisor was held liable under 42 U.S.C. § 1983 for damages resulting from fourth amendment violations. Also, at least one state has already statutorily authorized civil actions against law enforcement officers in lieu of exclusion of evidence resulting from fourth amendment violations. See Utah Code Ann. § 78-16-3 (Interim Supp. 1982).

Therefore, the predictions of doom forecast by those opposed to modifying the

rule have been proven to be unfounded both in common sense and in fact. There simply has yet to be any claim sustained by empirical evidence of the irreparable injury of any innocent citizen or group based upon a good faith exception to the exclusionary rule.

The Fifth Circuit has not been alone in establishing a good faith exception to the exclusionary rule. In State v. Mincey, 636 P.2d 637, 650 (Ariz. 1981), the Arizona Supreme Court sitting en banc held that the exclusionary rule was not applicable in situations in which a police officer had "proceeded in good faith reliance on the law in Arizona as he was advised by a legal expert." Similarly, the Louisiana Supreme Court followed Williams and adopted the good faith exception in upholding a search warrant based upon an affidavit from which material facts had been inadvertently but

in good faith omitted. State v. Lehnen, 403 So.2d 683, 686 (La. 1981). See also Gifford v. State, 630 S.W.2d 387, 391 (Tex.Crim.App. 1982), in which it was held that the exclusionary rule would not be applied when the "police misconduct was merely technical." The Supreme Court of Virginia has also indicated that it was persuaded by the reasoning of Williams. Holloman v. Commonwealth, 275 S.E.2d 620, 622 (Va. 1981). See also Drumheller v. Commonwealth, 29 S.E.2d 602, 605 (Va. 1982) (Poff, J. concurring). The Supreme Court of Vermont applied the same rationale the court used in Michigan v. DeFillippo, supra, when it refused to order suppression of evidence seized after a search based on an allegedly unconstitutional statute. State v. Harbaugh, 326 A.2d 821 (Vt. 1974).

Also, in a very recent search warrant case in which the judge erred in issuing a

warrant, the Massachusetts Supreme Court indicated that it wanted to apply a good faith exception to the rule. That court declined to do so only because it felt compelled to reverse in light of Coolidge. Commonwealth v. Sheppard, ___ N.E.2d ___, 32 Cr.L. 2158 (Mass., opinion filed Oct. 26, 1982). Moreover, at least one other federal court of appeals has adopted the rationale of Williams. See Robberson Steel Co. v. Occupational Safety and Health Review Comm., 645 F.2d 22 (10th Cir. 1980) (civil OSHA Enforcement Proceedings).

Moreover, at least three state legislatures have already adopted some type of statutory exception to the exclusionary rule. See Utah Code Ann. §§ 78-16-1 and 8 ("whether the conduct of the peace officer was in good faith"); Ariz. Rev. Stat. Ann. § 13-3925 ("evidence was seized by a peace

officer as a result of a good faith mistake or technical violation"); Colo. Rev. Stat. § 16-3-308 ("evidence was seized by a police officer...as a result of a good faith mistake or of a technical violation"). Also, the people of California, by initiative, have recently amended their constitution to prohibit exclusion of "relevant evidence." Cal. Const. Art. I, § 28(d).

The reasons for modifying the exclusionary rule to allow for the admission of evidence when seized in a reasonable and good faith belief that the seizure was lawful are compelling. The original purpose of the rule would still be effectuated since under the rationale of Williams the evidence would still be excluded if the officer's belief was not both reasonable and in good faith. The adoption of such an exception would restore

integrity to the judicial system while also serving justice by reinforcing the search for truth.

C.

EVIDENCE SHOULD NOT BE EXCLUDED WHEN A SEARCH WARRANT HAS BEEN ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE.

Regardless of whether the Court accepts the assertion found in the previous section of this brief that evidence should never be excluded in any "good faith" search and seizure, the amici emphatically submit that the rule should never be applied in cases involving duly issued warrants, absent a clear showing of fraud by the affiant or the unreasonable execution of the warrant.[2]

In Johnson v. United States, 333 U.S. 10, 13-14 (1948), the Court held that evidence seized pursuant to a warrantless

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[2]Of course, evidence could still be excluded if the police lie or deliberately mislead the magistrate or if the warrant is improperly executed -- exclusion under those circumstances would still be consistent with the purpose of the rule. Franks v. Delaware, 438 U.S. 154 (1978). Mapp v. Ohio, supra.

arrest should have been suppressed because the police officers had enough time and information to obtain a warrant. The arrest had been made after law enforcement officers smelled burning opium in the hallway of a hotel and obtained permission from the occupant of the room from which the smell emanated to enter the room. The Court emphasized that:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. Cf. United States v. Lefkowitz, 285 U.S. 452, 464 (1932). See also Coolidge v. New Hampshire, 403 U.S. 443 (1971), in which the Court emphasized the importance of seeking from a neutral and detached

magistrate the approval to search. In that case, the search warrant had been issued by an attorney general who was also directing law enforcement efforts to find the perpetrator of a murder. Several years after Coolidge was decided, the Court again emphasized the importance of the role of a neutral and detached magistrate in the balance between society's right to thwart crime and a citizen's fourth amendment right against unreasonable searches and seizures. Gerstein v. Pugh, 420 U.S. 103 (1975).

Therefore, there is absolutely no way that the alleged purpose of the exclusionary rule i.e., to deter police misconduct, could ever apply in a search warrant situation (absent perjury or deceit by the officer seeking the warrant). See Brown v. Illinois, supra at 422 U.S. 612, Powell, J., concurring in part. This Court, as

well as all other aspects of the judicial system, has actively encouraged officers to seek warrants. In United States v. Ventresca, 380 U.S. 102, 106 (1965), Justice Goldberg explained that in previous cases:

> [T]his Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. In Johnson v United States, 333 US 10 and Chapman v United States, 365 US 610, the Court, in condemning searches by officers who invaded premises without a warrant, plainly intimated that had the proper course of obtaining a warrant from a magistrate on the same evidence available to the police made a finding of probable cause, the search under the warrant would have been sustained.

Does it make sense then for the judiciary to exclude evidence under the guise of an unreasonable search and seizure when the police officer has obtained prior judicial approval for the search? Does it

make sense for the judiciary to exclude evidence after a judicial officer has issued a warrant which commands that a search and seizure be made? The amici submit that it obviously does not make sense, yet, as the rule is now applied, that is precisely what occurs daily all over the country. If the Court is not going to accord deference to its previous decisions which encouraged law enforcement officers to seek approval for searches Ventresca, supra, why should a police officer bother to go to a magistrate at all?

Moreover, as Justice White so aptly noted in his dissent in Payton v. New York, 445 U.S. 573, 619 (1980), law enforcement officers today are routinely called upon to make immediate on-the-spot "subtle discriminations that perplex even judges in their chambers." How then can it be considered

prudent to expect law enforcement officers to be deterred when evidence is excluded despite the fact that a neutral and detached magistrate authorized, and, in fact, commanded a search?

A striking example of the complexity of current search and seizure law is the controversy caused by the recent decisions of Robbins v. California, 453 U.S. 420 (1981) and Belton v. New York, 453 U.S. 454 (1981), which was not put to rest until United States v. Ross, ___ U.S. ___, 72 L.Ed.2d 572 (1982) was decided. It is significant to note that when Robbins was finally decided, fourteen judges had reviewed the search, and seven had found it valid and seven others had found it invalid. It is also significant to note that this Court resolved the legal ambiguity just the next term -- but during the interim how could the average police

officer on the street have been expected to understand the status of the law? Yet, from the time Robbins and Belton were decided until the matter was put to rest in United States v. Ross, amici submit that numerous criminal defendants who were otherwise guilty received the benefit of the "blunderbuss effect" of the exclusionary rule.

It is important to note that the rule of law sought by the amici can be made without the Court's having to overrule any prior cases. Since the judicial leap from exclusion of evidence in non-warrant cases to all fourth amendment cases was made without an explanation of why the rule was applicable, the Court has apparently never

addressed the issue.[3] United States v. Ross, supra, at 72 L.Ed.2d 593.

The application of the rule is especially harsh in this case because the police officers relied upon a search warrant issued by a neutral and detached magistrate. After receiving the initial anonymous letter, Illinois law enforcement officers went to great lengths to ascertain that the information was correct before attempting to obtain a warrant. This included obtaining information from a previously reliable confidential informant, information from the Illinois Secretary of State's Office, information from the Chicago Police Department agent assigned to O'Hare Airport, and information from a Drug

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[3] Nathanson v. United States, 290 U.S. 41 (1933); Giordenello v. United States, 357 U.S. 480 (1958); Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

Enforcement Administration Agent who had personally observed the Gates' activities in Florida. Amici ask what else could the law enforcement officers have done? Were they to sit by idly and allow a crime to occur? That is precisely the effect of the application of the rule in this case in which a warrant was obtained only after all the information and details were corroborated. Draper v. United States, 358 U.S. 307 (1959).

The fact remains that regardless from what perspective the anaylsis is made, it makes no sense to apply the exclusionary rule in cases in which law enforcement officers have in good faith obtained a search warrant from a neutral and detached magistrate. Law enforcement officers are not supposed to second guess judges who have commanded or authorized them to search a person or place. There is simply no

reason to apply the rule in a search warrant case because the reason for the rule, i.e., police deterrence, cannot possibly exist in a case in which a warrant has been properly issued. At least one commentator has recognized this. J. Fennelly, Warrant Searches and the Exclusionary Rule, A Rule in Search of a Reason (to be published in Notre Dame Law Review, Spring 1983).

Moreover, the Court has already established in Michigan v. DeFillippo, supra, that police officers could rely in good faith on legislative enactments subsequently judicially determined to be constitutionally infirm without the sanction of the exclusion of evidence. The argument is much more compelling that a police officer may in good faith rely upon a judicial determination that probable cause exists and that a warrant may

lawfully issue commanding execution of the warrant. United States v. Williams, supra, at 622 F.2d 841. If not, upon whom can he rely? And if not, why has this Court commanded that police seek prior approval by the judiciary to legitimize the warrant? Coolidge, supra. Moreover, police officers cannot take "it upon themselves to determine...[whether the warrant] was constitutionally entitled to enforcement...." Michigan v. DeFillippo at 443 U.S. 38. If they could, why require them to go to a magistrate in the first place?

The judiciary and law enforcement branches are distinct parts of the entire criminal justice system. The judiciary has regularly emphasized the importance of obtaining its approval before law enforcement officers are allowed to invade someone's privacy, even a criminal's.

Coolidge v. New Hampshire, supra; Johnson v. United States, supra; United States v. Ventresca, supra. Thus, by rigid application of the rule, the judiciary punishes both society and law enforcement while the criminal goes free. This is the antithesis of common sense.

The time has come to give law enforcement officers "breathing room" to operate in the harsh environment of the real world. It is also the time to restore integrity to the criminal judicial system by not applying the exclusionary rule to cases involving search warrants. See United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975). At the very miminum, society and the search for truth should not be punished because "the judge has blundered."

CONCLUSION

There is no doubt that the exclusionary rule has failed to withstand the test of time. As the rule is currently being applied across the country, it fails to deter police officers who are acting with a good faith belief that their conduct is lawful, and it also fosters disrespect for the judicial system by punishing society rather than the guilty defendant.

The rule should be modified to allow the admission of evidence in cases in which police officers acted with a reasonable, good faith belief that their conduct was lawful. However, evidence should never be excluded in cases in which a warrant has been properly executed by the police after having been properly issued by a neutral and detached magistrate. Amici respectfully request the Court to seize this opportunity to correct the injustice

that blind administration of the exclusionary rule has inflicted upon society.

Respectfully submitted,

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As of 1/21/83, the following additional materials have been requested or are in the process of being obtained:

Arizona Rev. Stat. Am., Sec. 13-3925

U.S. v. Williams, 622 F.2d 830 (5th Cir. 1980)

Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives, 1975 WASH. V.L. Q. 621

Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 GEO.L.J. 1361 (1981)

11 Colo. Law. 410 (1982)

11 Colo. Law. 704 (1982)

60 WASH. V.L.Q. 161