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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

ALTERNATIVES TO THE EXCLUSIONARY RULE

An Analysis Prepared for the Alaska State Senate by

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Appendices

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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

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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.

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(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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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).