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of police misconduct is firmly grounded in recent Court decisions. This premise surely would have shocked the members of the unanimous Supreme Court that first formulated the fourth amendment exclusionary rule in *Weeks*. When the rule was conceived, it was not premised on deterrence at all, but on an amalgam of values, and was viewed as inextricably bound up with the fourth amendment itself. Thus, the Court originally saw the suppression of evidence as a necessary consequence of a fourth amendment violation. This notion, that the rule is compelled by the Constitution, has given way to the view that the rule is only necessary as a means of enforcing the protections of the fourth amendment. The Court has thus shifted and successively narrowed the rule's underlying rationales to the point that its sole justification is now seen as deterrence of police misconduct.

Second, the article discusses the exclusionary rule as a deterrent, and examines the level of deterrence that the exclusionary rule must generate in order to justify its continued application. The article will argue that because the exclusionary rule is applied to enforce fourth amendment rights, the probable cause requirement of the fourth amendment suggests a level of deterrence ample to justify the rule—that for every suppression of probative evidence, the rule must deter one unfruitful search. Although critics of the rule contend that the exclusionary rule does not satisfactorily deter police misconduct, this section of the article demonstrates that critics overlook the synergistic effects of a viable suppression system. Further, these critics argue that the exclusionary rule hampers effective law enforcement by "freeing the guilty," and suggest that a tort remedy would be a more appropriate sanction for police misconduct. These suggestions are disingenuous; an effective tort remedy would have an even greater negative impact on law enforcement, because such a remedy would deter more lawful police conduct than does the exclusionary rule, and an ineffective tort remedy would not offer any protection for fourth amendment rights.

The article next focuses on the decision in *United States v. Williams*, and argues that the Fifth Circuit's three principal justifications for adopting the good faith exception are invalid. First, it will demonstrate that the good faith exception does not affect merely the exclusionary rule, but rather diminishes the protections of the fourth amendment itself. It will then show that the exception strips the exclusionary rule of an important deterrent effect by permitting the introduction of illegally-seized evidence in situations when the rule would operate as a "general" or "systemic" deterrent. Finally, it will argue that the exception is not consistent with precedent, and is in fact contrary to several recent Supreme Court decisions, as well as the principles upon which the Court has traditionally resolved fourth amendment issues.

The article uses the *Williams* decision to illustrate the theoretical limitations of the good faith exception, and to highlight the tension and contradictions that the exception will cause in practice. A distressingly broad range of misconduct will be excused under the good faith exception, for use of the exception almost surely will change the fourth amendment standard for searches and seizures from probable cause to general reasonableness.

Finally, the article comments on how *Williams* mirrors a subtle, but revealing, shift in the criticism leveled at the exclusionary rule by its opponents.

Where formerly the rule was attacked because it failed to deter unlawful police conduct, now it is attacked because it deters unlawful conduct all too well. These opponents of the rule should be more candid: they should not mask their objection to an interpretation of the fourth amendment as an attack on the exclusionary rule.

II. *WILLIAMS* IN HISTORICAL PERSPECTIVE

Like most other provisions of the Bill of Rights, the fourth amendment is not self-executing;[40] it simply recognizes that the people have a right to be secure from unreasonable searches and seizures.[41] The first clause of the amendment commands that this right "shall not be violated," and the second requires that warrants "shall issue" only when specifically limited in scope and supported by a minimum quantum of evidence—probable cause.[42] Nowhere does the fourth amendment prescribe, however, what consequences must follow from a search or seizure that is either unreasonable or conducted in violation of the warrant requirement.

Thus, if the fourth amendment's protections are to be enforced, they require a remedy that will guarantee the rights granted by its language. Because the amendment itself provides no enforcement mechanism, a court called upon to enforce the amendment's protections apparently would have to resolve two separate issues. First, it would have to determine whether a fourth amendment violation had occurred. This determination would require the court to delineate the contours of the right itself, not only by analyzing the relationship between the amendment's two main clauses,[43] but also by giving content to its

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40. It was many years before the courts developed mechanisms to enforce most of the provisions of the Bill of Rights. The fourth amendment, like the other provisions, did not even arguably apply to the states until the fourteenth amendment was adopted in 1868, *see* Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855) (Constitution restrains only issuance of warrants under federal law and has no application to state process), and during the nineteenth century there were relatively few federal criminal prosecutions. *See* note 47 *infra* and accompanying text. Moreover, the Supreme Court did not take much interest in state criminal prosecutions until the 1930's. Thus, the fact that the exclusionary rule was not formulated until 125 years after the Constitution's ratification, and not applied to the states until 1961, should be of little significance in assessing its legitimacy or its value. *See* Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 74-75 (1978) (discussing relatively recent development of remedies for constitutional violations).

41. *See* note 2 *supra* (text of fourth amendment).

42. *Id.*

43. In attempting to define the relationship between these two clauses, the Court has misread the amendment's history. The Court has suggested that the purpose of the warrant clause was to establish a procedural mechanism for safeguarding individual privacy rights; that is, as a way of minimizing the likelihood that the unreasonable searches prohibited by the first clause will occur. *See generally* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-46 (1969). History demonstrates, however, that the seeds of the fourth amendment, first sown in England and then transplanted to the colonies, grew out of a fear of arbitrary searches and seizures conducted pursuant to "general warrants" which authorized their bearers to search broadly and at will for evidence of crime. *Id.* at 38-44. In eighteenth century England, the typical purpose of the general warrant was to root out those suspected of seditious libel. *Id.* at 25-26. The two leading pre-revolutionary English cases striking down such warrants were Wilkes v. Wood, 19 Howell's State Trials 1153 (1763), and Entick v. Carrington, 19 Howell's State Trials 1029 (1765). The English exported these general warrants to the colonies in the form of writs of assistance, which the King's customs officials used widely to search private premises and seize smuggled goods. T. TAYLOR, *supra*, at 35-36. These searches and seizures, made pursuant to such general warrants, constituted the evil at which the framers directed the protections of the fourth amendment. *Id.* at 35-43.

This intent is evident from the original draft of the amendment, which reads, "The right of the

essential terms: "search," "seizure," "unreasonable," and "probable cause."[44]

people to be secured [sic] in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." 1 ANNALS OF CONGRESS 783 (1789), *quoted in* 1 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 1.1, at 5 (1978) [hereinafter LAFAVE, SEARCH AND SEIZURE]. A substantial majority of the delegates voted down the amendment as originally proposed. *Id.* Nevertheless, Representative Benson, the author of the rejected language, succeeded in sneaking his language back into the proposed amendment and the full Congress approved it in that form. *Id.* For a thorough account of the origins of the fourth amendment, see J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT ch. 1 (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1970).

Although the Court has misread the fourth amendment's history with respect to the purpose of the warrant clause, it has, in light of that history, correctly interpreted the probable cause requirement of the amendment as establishing the threshold test for reasonableness of searches and seizures made with or without a warrant. *See* note 43 *infra* (arguing that probable cause is prerequisite to fourth amendment reasonableness). Fearful of both the arbitrariness and the breadth of the writs of assistance, the framers adopted the fourth amendment with a dual intent: the purpose of the probable cause requirement was to ensure that searches and seizures had an adequate basis in fact; the purpose of the particularity requirement was to guarantee that they were limited in scope to the persons or things to be seized.

44. The thesis of this article rests in part on the premise that probable cause is a prerequisite to fourth amendment reasonableness, at least in the context of arrests and most searches (as opposed to stops and frisks). The Supreme Court has stated clearly and repeatedly that probable cause is required to support an arrest or, with few exceptions, a search. *E.g.*, United States v. Watson, 423 U.S. 411, 423-24 (1976); Carroll v. United States, 267 U.S. 132, 162 (1925), *cited with approval in* Brinegar v. United States, 338 U.S. 160, 175-76 (1949); *see* note 118 *infra* (discussing exceptions). Although the framers did not intend the warrant clause to act as a procedural mechanism for preventing unreasonable searches and seizures, they apparently did intend to forbid all searches and seizures made without probable cause. *See* T. TAYLOR, *supra* note 43, at 38-44. At the time of the amendment's adoption, no officials in this country or in England even contemplated entering and searching a house without a warrant. Although arrests could be made in public without a warrant, they had to be based on probable cause. This requirement raised no problems, however, because at that time arrests almost invariably were made after hot pursuit or following a hue and cry, and so were supported by very strong evidence. *Id.* at 27-29. Warrantless searches incident to arrest apparently were routine and did not evoke the fear or concern that accompanied the exercise of the general warrant. *Id.* at 27-29, 39, 43. Thus, searches made pursuant to general warrants issued on less than probable cause were not only what the framers feared most, they were, generally speaking, the only non-probable cause searches and seizures likely to occur at that time.

Surely only a bizarre interpretation of the amendment, either as adopted or proposed, would yield the anomalous result of on the one hand requiring probable cause for the issuance of a warrant, and yet on the other hand permitting warrantless searches on less than probable cause. To its credit, the Supreme Court plainly has rejected any such interpretation. *See* Wong Sun v. United States, 371 U.S. 471, 479 (1963) (whether or not requirements of reliability or particularity of information on which officer may act are more stringent when warrant absent, they surely cannot be less stringent than when warrant obtained); Henry v. United States, 361 U.S. 98, 104 (1959) (although *Carroll* relaxed requirements for warrant on grounds of practicality, did not dispense with need for probable cause); *cf.* Delaware v. New York, 442 U.S. 200, 208 (1979) (probable cause standard represents accumulated wisdom of precedent and experience and defines minimum justification necessary to make amount of intrusion involved in arrest "reasonable" under fourth amendment); Brinegar v. United States, 338 U.S. 160, 176 (1949) ("long-prevailing" standard of probable cause embodies best compromise for accommodating often opposing interests in safeguarding citizens from rash and unreasonable interferences with privacy and in "seeking to give fair leeway for enforcing the law in the community's protection"). *See also* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.1, at 439; J. LANDYNSKI, *supra* note 43, at 42-43; Saltzburg, *Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 159-63 (1980).

In a forthcoming article, Professor Posner argues that the exclusionary rule should be scrapped, and that the fourth amendment should be viewed simply as subjecting the police (and their governmental employers) to tort liability for unreasonable searches and seizures. R. Posner, Rethinking the Fourth Amendment 1-2 (Sept. 22, 1981) (unpublished) (copy on file at *Georgetown Law Journal*). Under Posner's approach, a search or seizure would not be unreasonable simply because it was made without probable cause; rather, the test in all cases would be whether the benefits to society reasonably expected to flow from the search and seizure outweighed the anticipated costs to legitimate privacy interests. *Id.* at 26-32. A criminal's interest in avoiding detection and conviction for his commission of a crime

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a new metropolitan constabulary
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Second, the court would need to decide what consequences should attach when the government carries out an unreasonable search, however defined. Although such a two-step inquiry might seem to have been required, the Supreme Court, in its early encounters with the provision, did not divide its analysis in this manner. Only within the last thirty years has the Court bifurcated its fourth amendment analysis into two distinct inquiries.[45]

For almost 125 years after the adoption of the Bill of Rights, the courts entertained virtually no suits, either civil or criminal, brought under the fourth amendment. During that period, the amendment applied only to the federal government,[46] which in those simpler times had few laws and only a small contingent of agents to enforce them.[47] Even at the state and local levels, the first organized police forces did not appear until well into the nineteenth century.[48] Moreover, there were, of course, no telephones to tap or electronic bugs

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would not be counted as such an interest. *Id.* at 4-5. Moreover, Posner would apparently impose no constitutional limits on the legislative power to authorize arrests or searches (as long as they were warrantless!) on less than probable cause. *Id.* at 30-32. In other words, the legislature could, consistent with the Constitution, empower the police to search, arrest, and interrogate on the slightest suspicion. The victim of a particular search, however, would still be entitled to relief in a tort action if he could show that the search was "unreasonable" because its anticipated costs to privacy interests outweighed the anticipated benefits to society. Posner suggests that these costs and benefits would then be weighed by the jury.

There are both practical and doctrinal defects in this proposal. How, for example, are the aoristic benefits to society of apprehending someone who has committed a particular crime to be weighed by the police, and later the jurors? Are they to consider, and put a monetary value on: the likelihood and severity of future criminal conduct by the suspect, the likelihood of his rehabilitation if he is apprehended, the gain in general deterrence if he is caught, the demoralization costs to the victim and others if he is not caught, and so on? Can we really trust the police and juries to put a value on other people's privacy, particularly when those who are most likely to be subject to coercive and intrusive police action are members of minority groups, and thus are least able to protect themselves through the political process?

Moreover, because society collectively determines what conduct should be made criminal and the "seriousness" of particular crimes, it is hard to see why, on a purely cost-benefit analysis, the Constitution should be seen as imposing any anti-majoritarian limits on the legislature's power to authorize coercive police conduct aimed at preventing crime. Indeed, even the third degree may be reasonable, that is, cost-effective, on some occasions. The reason that a simple majority cannot institute a police state is not that it is uneconomic, but rather that it is prohibited by provisions of the Bill of Rights, most importantly by the fourth amendment.

Posner contends, however, that the probable cause requirement of the warrant clause does not stand in the way of his proposal, arguing that the clause should not be read as setting the standard for arrests and searches without a warrant. *Id.* at 30. He maintains that the warrant clause would not be superfluous even if its specific requirements did not apply to warrantless searches because the police still would need a common law or statutory basis to make a warrantless arrest or search. *Id.* at 28 n.56. The warrant clause, on this reading, simply ensures that where the basis for the arrest or search is a warrant, the requirements of the warrant clause will be met. Posner also argues that the clause prevents the police from "a more secure defense of legal process" where a search is conducted pursuant to a warrant. *Id.* This fails to explain, however, why the warrant clause should require a fixed quantum of proof—probable cause—to support a warrant, if the reasonableness requirement of the first clause does not also presuppose probable cause for warrantless searches or seizures. Posner recognizes that the acceptance of his interpretation will depend on the weight given to the principle of stare decisis in the fourth amendment area. *Id.* at 2.

45. The Court first undertook this bifurcated analysis of fourth amendment questions in Wolf v. Colorado, 338 U.S. 25, 28-32 (1949).

46. The fourth amendment was not applied to the states until Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

47. *See* California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) (list of federal criminal statutes has greatly expanded).

48. The modern police system originated in 1829 when Sir Robert Peel, as Home Secretary, initiated a new metropolitan constabulary pursuant to a Parliamentary Bill authorizing the action. V. FOLLEY, AMERICAN LAW ENFORCEMENT 61 (1980). The new force stressed discipline, semi-military organiza-

to plant. Nineteenth-century law enforcement officers could not base their arrests on other standard twentieth-century investigative techniques such as fiber analysis, photographic identifications, or information transmitted by police radio. Instead, arrests were almost invariably made on or near the scene of the crime in response to a "hue and cry,"[49] and there were few fourth amendment challenges to police determinations of probable cause.[50]

The turn of this century, however, brought a rapid proliferation of federal criminal laws, and with it, a vast increase in the number of searches, seizures, and federal criminal prosecutions.[51] Increasingly, defendants sought to preclude the government from using against them evidence obtained through allegedly-unconstitutional searches or seizures conducted by its agents. Thus, both the task of defining the scope of fourth amendment rights and of determining how such rights were to be enforced arose in the context of federal criminal prosecutions.

It was in this context that the Supreme Court, rebelling against the notion that it should sanction unconstitutional searches, ruled that the government may not use evidence obtained through the misconduct of its agents. When this "exclusionary rule" was first formulated in *Weeks v. United States*,[52] it was

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tion and operation, and high-quality staff. *Id.* Headquartered on a small side street called "Scotland Yard," the constables' effective operation quickly gained the esteem and respect of an initially wary public. *Id.* at 62-63. The members of the force soon became known as "peelers" or "bobbies" out of respect for Sir Robert Peel. *Id.* at 63.

The first American police officers were parish constables, appointed during colonial rule. *Id.* at 67. Because America was predominantly rural until the twentieth century, municipal police departments grew slowly. Initially, cities were concerned primarily with security during the evening hours, and as they grew, they established routinized night watches. *Id.* at 67-68. Boston founded the first night watch in 1636, with similar forces arising in New York in 1658, and in Philadelphia in 1700. *Id.* at 70. Not until the mid-1800s did American cities, following the British pattern, institute daytime police patrols. *Id.*

49. W. SHEPPARD, THE OFFICES OF CONSTABLES ch. 8, § 2, no. 4 (London. c. 1650), *quoted in* T. TAYLOR, *supra* note 43, at 39.

50. Until fourth amendment privacy was held to be enforceable against the states in Wolf v. Colorado, 338 U.S. 25 (1949), fourth amendment "probable cause" issues could only arise when federal officials were involved or under state constitutions with a probable cause requirement. *Id.* at 28.

51. Prior to the turn of the century, only three cases contesting substantive fourth amendment issues reached the Supreme Court. This may have occurred simply because the Court's appellate jurisdiction was not expanded to include any criminal cases until 1891. *See* 26 Stat. 826, § 5 (1891) (conferring Supreme Court jurisdiction over "cases of conviction of a capital or otherwise infamous crime"). *See also* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3503, at 8 (1975) (no Supreme Court review of federal criminal cases under Judiciary Act of 1789). Of the 25 cases involving searches and seizures that the Supreme Court decided between *Weeks* and the repeal of prohibition in 1933, 24 of them involved gambling, bootlegging, or narcotics offenses. Harris v. United States, 331 U.S. 145, 175-81 (1947) (Frankfurter, J., with Murphy & Rutledge, JJ., dissenting).

52. 232 U.S. 383 (1914). Among the items seized were books, letters, bonds, mining certificates, an old newspaper, clothes, candy, and a tin box. *Id.* at 387. The property was taken by the government to be used for evidence in its prosecution of the defendant for unlawful use of the mails to transmit lottery tickets. *Id.* at 388. Only the letters, however, were introduced at trial. *Id.* at 394.

Weeks was the first case in which the Court excluded evidence solely on fourth amendment grounds. In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court excluded evidence acquired in violation of the defendant's fourth and fifth amendment rights. *Id.* at 633-35. The Court held unconstitutional a statute that forced a person to produce, upon court order, any document that might tend to prove a non-criminal allegation by the government of the violation of a revenue law, or else have the allegation taken as confessed. *Id.* Although the law technically applied to civil proceedings, the Court found that it fell within the fourth and fifth amendments because its provision for forfeiture and penalties were of a quasi-criminal nature. *Id.* at 634. The Court grouped the fourth and fifth amendments

not a consciously chosen device for deterring fourth amendment violations.[53] Rather, it was simply the the natural outgrowth of the prevalent form of litigation, federal criminal prosecutions, which consistently raised fourth amendment issues.

There were several distinct normative principles underpinning the *Weeks* exclusionary rule: first, that it was simply unfair to convict a defendant on the basis of evidence unlawfully seized from him;[54] second, that it was an addi-

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together because "the seizure of a man's private books and papers against him is [not] substantially different from compelling him to be a witness against himself." *Id.* at 633.

Before *Weeks*, only one state excluded evidence obtained in violation of a state constitutional provision prohibiting unreasonable searches. State v. Sheridan, 121 Iowa 164, 96 N.W. 730 (1903), *cited in* Wolf v. Colorado, 338 U.S. 25, 34 app. (1949). In the 35 years between *Weeks* and *Wolf*, 16 states chose to follow the *Weeks* rule, while 30 states rejected it. Wolf v. Colorado, 338 U.S. at 29.

Otherwise admissible evidence may also be excluded for other reasons, for example: (1) to protect the defendant's fifth amendment privilege against self-incrimination, *see* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (accused must be effectively apprised of rights during in-custody interrogations to combat inherent pressures to incriminate himself); Rogers v. Richmond, 365 U.S. 534, 543–44 (1961) (admissibility of defendant's confession dependent upon whether law enforcement officials compelled confession, not upon truthfulness of confession); (2) to protect the defendant's sixth amendment right to counsel, *see* Brewer v. Williams, 430 U.S. 387, 394-95, 406 (1977) (affirming exclusion of evidence obtained through self-incriminatory statements elicited in violation of defendant's right to counsel); (3) to safeguard a defendant's due process right to avoid conviction based on unreliable identification, *see* Manson v. Brathwaite, 432 U.S. 98, 112-14 (1977) (reliability of identification assessed by examining totality of circumstances); Stovall v. Denno, 388 U.S. 293, 302 (1967) (due process denied by confrontation unmistakably suggestive and conducive to mistaken identity); (4) to protect rights created by state constitutional provisions, *see* State v. Kaluna, 55 Hawaii 361, 369-71, 520 P.2d 51, 58-59 (1974) (protections of Hawaii Bill of Rights can be extended beyond parallel provisions of federal Bill of Rights; affirming order suppressing drugs seized in pre-incarceration search for weapons because packet containing drugs searched out of curiosity); (5) to ensure rights mandated by a federal statute, *see* 18 U.S.C. § 2515 (1976) (prohibiting use of evidence seized outside scope of statutory scheme regulating wiretapping); or (6) as an exercise of a court's supervisory powers. *See* McNabb v. United States, 318 U.S. 332, 341-42 (1943) (evidence acquired through involuntary confession excluded in exercise of Court's supervisory authority over administration of criminal justice in federal courts).

This article is concerned only with the exclusion of evidence obtained in a search or seizure that violated the fourth amendment to the United States Constitution, and the term "exclusionary rule" shall be used to refer only to such evidence.

53. Justice Holmes summarized the premise behind an exclusionary policy in a simple proposition: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired should not be used before the Court, but that it should not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). During its early stages, the reach of the exclusionary rule was broad. In *Silverthorne*, for example, the Court held invalid grand jury subpoenas because they were based on knowledge obtained from illegally-seized evidence. *Id.* at 392.

54. *See generally* Schrock & Welsh, *supra* note 34, at 257-60. Founding their position upon a "unitary model" of government, the authors stress that a court's admission of evidence derived from the improper conduct of police makes the judiciary "vicariously responsible" for the executive's wrong. *Id.* at 258, 260. The entire government has thus denied a "fair prosecution" to a defendant. *Id.* at 258. The authors rely mostly upon the dissenting opinions of Justices Holmes and Brandeis in *Olmstead v. United States*. *See* note 56 *infra*. They argue, however, that those dissenting opinions merely make "vivid the unitary thinking pioneered in *Weeks*." Schrock & Welsh, *supra*, at 255 n.25.

Even among judges who at other times may have expressed skepticism about the exclusionary rule, this "unitary thinking" may have its appeal. In Crews v. United States, 369 A.2d 1063 (D.C. 1977), *rev'd*, 389 A.2d 277 (D.C. 1978) (en banc), *rev'd*, 445 U.S. 463 (1980), Judge Stanley S. Harris noted both the "social costs" of the exclusionary rule, and its "limited efficacy" as a deterrent. *Id.* at 1069 n.7. Recently, in Smith v. Whitehead, No. 79-526 (D.C. Sept. 10, 1981), Judge Harris dissented from the majority's affirmance of a jury award of damages in an action in conversion that was brought against several police officers. The officers, while executing a search warrant for drugs and evidence of drug dealing, seized large numbers of household items from a private home. *Id.*, slip op. at 3-5. Because the officers, whether or not correctly, believed that the property had been received as payment for drugs, and hence could be used as evidence in court, Judge Harris concluded that the police lacked the intent necessary for conversion. *Id.* at 35 (Harris, J., dissenting). In his view, they were merely acting as agents of the judiciary. He wrote: "As officers seizing items pursuant to a search warrant, they acted on

tional unlawful invasion of his privacy to admit such tainted evidence at his trial;[55] third, that the government should not be able to profit from the wrongdoing of its agents;[56] and fourth, that the integrity of the federal courts should not be compromised through the admission of unlawfully-seized evidence.[57]

As long as the fourth amendment governed only the conduct of federal officials, these principles coexisted harmoniously, and the Court had no need to consider their relationship. When the Court attempted to apply the fourth amendment to the states, however, this harmony was shattered. The dissonance resulted from the Court's severing the inquiry into whether the government had violated the defendant's fourth amendment rights from that of whether to apply the exclusionary rule.

In *Wolf v. Colorado*,[58] the Supreme Court for the first time ruled that the core value protected by the fourth amendment—"the security of one's privacy

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behalf of the court which authorized the warrant. . . . [T]hey intended merely to seize evidence on behalf of the court for possible use in a criminal prosecution." *Id.* (citation omitted). If the police are judicial agents when they conduct seizures—at least those pursuant to a warrant—then the illegal conduct of the police should be imputed to the courts, unless they disavow the officers' actions through exclusion of evidence. Thus, Judge Harris has unwittingly articulated the philosophical basis for a theory of the exclusionary rule not grounded on deterrence.

55. The early exclusionary rule cases generally involved the illegal seizure of private papers. *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (grand jury subpoena based on illegally-seized papers held invalid); Weeks v. United States, 232 U.S. 383, 398 (1914) (letter seized illegally from defendant by federal official without warrant); Boyd v. United States, 116 U.S. 616, 638 (1886) (notice to produce invoices held erroneous and unconstitutional). Exclusion of evidence to preserve personal privacy, however, lost much of its appeal as evidence challenged by motions to suppress tended increasingly to be either contraband or stolen property. This precept was explicitly rejected by the Court in United States v. Calandra, 414 U.S. 338, 347 (1974) (purpose of exclusionary rule not to remedy invasions of individual privacy, but rather to deter future unlawful police conduct). *See* notes 95-98 *infra* and accompanying text (discussing *Calandra*).

56. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (government prevented not only from presenting unlawfully seized papers in evidence against defendant, but also from using information acquired from papers). In his dissent in *Olmstead v. United States*, Justice Brandeis wrote what is perhaps the most memorable statement of this principle:

> If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In a separate opinion, Justice Holmes agreed with Justice Brandeis that the government should not profit from its criminal acts: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Id.* at 470 (Holmes, J., separate opinion).

57. The *Weeks* Court stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting the accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392. After the fourth amendment was applied to the states, the Court relied on the "imperative of judicial integrity" to prevent the introduction of evidence, unlawfully seized by state officials. *See* note 75 *infra* and accompanying text.

58. 338 U.S. 25 (1949). Though you would not know it from the five rather abstract and antiseptic opinions that the sharply divided Supreme Court produced in *Wolf*, the case involved the prosecution of a physician for conspiracy to commit abortion. The evidence against him included appointment books seized from his office. Wolf v. People, 117 Colo. 279, 281, 187 P.2d 926, 927 (1947), Wolf v. People, 117 Colo. 321, 322, 187 P.2d 928, 929 (1947), *aff'd*, 338 U.S. 25 (1949).

against arbitrary intrusion by the police"[59]—was "implicit in the concept of ordered liberty and as such enforceable against the states through the Due Process Clause" of the fourteenth amendment.[60] The Court ruled, however, that the Constitution did not require a state to enforce this right through the exclusionary rule.[61] Although the Court had originally considered the rule an essential ingredient of the fourth amendment, the majority in *Wolf* reduced the status of the rule to merely "a matter of judicial implication,"[62] and "remanded" those defendants aggrieved by unconstitutional police conduct to "such protection as the internal discipline of the police, under the eyes of an alert public opinion may afford."[63]

The Court's analysis in *Wolf* introduced new concepts that created intolerable tensions between state and federal law.[64] To begin with, by applying the fourth amendment to the states, the Court greatly extended the range of government officials subject to the fourth amendment and concomitantly expanded the right of people to be secure from unreasonable searches and seizures. At the same time, however, the Court left to the police themselves the responsibility for seeing to it that those rights were respected. In short, the Court created rights, but provided no remedy for their enforcement.

Moreover, the Court for the first time injected the instrumental rationale of deterrence of police misconduct into its discussion of the exclusionary rule.[65] At the same time, however, it made clear that it did not view this rationale as compelling.[66] Furthermore, by using the empirically-based, consequentialist rationale of deterrence as support for its refusal to apply the exclusionary rule to the states, the Court necessarily undercut one normative theme of the rule: that the accused has a personal due process right not to be convicted with evidence seized from him in violation of the Constitution. For if there were such a right, it should be equally available to state and federal defendants, all

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59. 338 U.S. at 27.

60. *Id.* at 27-28. The Court did not incorporate at once the whole of the fourth amendment into the fourteenth amendment. The Court in *Wolf* took the first step. The range of the fourth amendment interests encompassed by *Wolf* remained unclear, however, until the Court ruled in Ker v. California, 374 U.S. 23 (1963), that the fourth amendment applied with full force to the states, and that the constitutional standards governing federal officials also apply to state officials. *Id.* at 33. Until it extended the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961), there were simply no cases requiring the Court to elucidate just what constraints the fourth amendment imposed on state officials through the fourteenth amendment. This tends to bear out the thesis of this article: without the exclusionary rule, the contours of the fourth amendment remain undeveloped.

61. 338 U.S. at 33. Prior to *Wolf*, several states had provisions similar to the fourth amendment. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 132-33 (1973). Some of these states enforced their fourth amendment surrogates with judicially-created exclusionary rules. *See* Wolf v. Colorado, 338 U.S. at 34-38 (Tables B, D, F, I) (setting forth cases in which states adopted exclusionary enforcement measures). By leaving enforcement of the fourth amendment to the states, *Wolf* did not alter the states' practices regarding the exclusionary rule.

62. 338 U.S. at 28.

63. *Id.* at 31.

64. *See* Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 5 (*Wolf* contained "seeds of its downfall"; Court recognized broad federal right but relegated it to "tender mercies" of states for enforcement).

65. 338 U.S. at 31.

66. Although the Court recognized that "in practice the exclusion of evidence may be an effective way of deterring unreasonable searches" it concluded that "incidence of such conduct by [state] police [may be] too slight to call for" the remedy of exclusion, and that the "public opinion of a community" may exert sufficient influence on the police. *Id.* at 31-32.

of whom enjoy the protections of due process. Thus, by driving a wedge between the fourth amendment and the exclusionary rule, the Court in *Wolf* dealt the rule a blow from which it has never recovered. Although the Court said that it "stoutly adhere[d] to" the exclusionary rule of *Weeks*,[67] it never adequately explained why, if the rule was unnecessary for the enforcement of fourth amendment rights in state courts, it was indispensible in federal courts.

The tension implicit in *Wolf* soon became unbearable. As the federal courts continued to expand the range of fourth amendment protections in the course of deciding exclusionary rule cases, the gap between federal and state privacy rights began to widen. In those states whose courts did not apply the exclusionary rule, the privacy rights protected by the fourth and fourteenth amendments remained undeveloped. As a result, while federal law enforcement agencies responded by modifying investigatory practices to conform to evolving fourth amendment standards, in states without an exclusionary rule egregious and premeditated official misconduct continued; neither the "internal discipline" of the police nor "the eyes of an alert public opinion" proved sufficient to protect those most likely to be victimized by police lawlessness.[68] Several states adopted the exclusionary rule on their own initiative,[69] realizing that if the command of the Constitution was to be enforced against state officers, it would have to be enforced through the exclusionary rule.

Even in the Supreme Court, the erosion of *Wolf* began almost as soon as it was announced.[70] In *Rochin v. California*,[71] the Court held that an exclusionary rule, grounded in the due process clause of the fourteenth amendment, applied in state criminal prosecutions to evidence obtained through police misconduct "so brutal and so offensive to human dignity"[72] that it "shocks the

67. *Id.* at 28.

68. *See* Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 323-24 (prior to *Mapp*, fourteenth amendment search and seizure guarantees were not protected by states). In states without an exclusionary rule, defendants had no way to object to the admission of evidence on the ground that it had been seized in violation of their fourth amendment rights. Some particularly offensive seizures, however, were challenged on due process grounds. One such case was Irvine v. California, 347 U.S. 128 (1951). In *Irvine*, the defendant sought suppression of evidence obtained by the police when they bugged his home. Acting without a search warrant or probable cause, the police had made repeated covert entries into Irvine's home and had concealed microphones in various places with the hope that they would overhear incriminating statements. *Id.* at 131. In one instance, the transmitter was placed in the defendant's bedroom. *Id.* The Supreme Court affirmed the petitioner's conviction: because there had been no coercion, there was no denial of due process. *Id.* at 133, 138 (plurality opinion). At the suggestion of Justice Jackson and Chief Justice Warren, *id.* at 138, the FBI investigated the case for possible federal prosecution of the officers. The investigation revealed that the officers had been acting under orders of the Chief of Police and with full knowledge of the local prosecutor. Note, *State Police, Unconstitutionally Obtained Evidence and Section 242 of the Civil Rights Statute*, 7 STAN. L. REV. 76, 94 n.75 (1954). It was cases like *Irvine* that led the California Supreme Court to adopt the exclusionary rule in People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955). *See* Traynor, *supra*, at 324 (in period between *Irvine* and *Cahan* it became clear that California had to adopt exclusionary rule).

69. *See* Elkins v. United States, 364 U.S. 206, 224-32 (1963) (listing state court decisions on admissibility of unlawfully-seized evidence); People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955) (adopting exclusionary rule in California).

70. *See generally* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 629 (Supreme Court made inroads into *Wolf* just a few years after it was decided). Mr. Geller's article provides an excellent discussion of the arguments that have been made for and against the exclusionary rule.

71. 342 U.S. 165 (1952).

72. *Id.* at 174.

conscience."[73] Soon thereafter, in *Elkins v. United States*,[74] the Court forbade the use in federal prosecutions of evidence unlawfully seized by state police officers, thereby rejecting the "silver platter doctrine."[75] Notably, *Elkins* was the first case to be decided explicitly on the deterrence rationale.[76]

Ultimately, in *Mapp v. Ohio*,[77] the Court tried to repair the damage by overruling *Wolf* and applying the exclusionary rule to the states.[78] Yet where the

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73. *Id.* at 172. In *Rochin*, three Los Angeles deputy sheriffs entered Antonio Rochin's home through an open outside door during the course of a narcotics investigation. *Id.* at 166. The officers forced open a bedroom door and found Rochin and his wife. *Id.* The officers saw two capsules on a night stand. *Id.* When the deputies asked "Whose stuff is this?" Rochin grabbed the capsules and swallowed them. *Id.* The three officers unsuccessfully tried to extract the capsules from Rochin's mouth. *Id.* They then handcuffed Rochin and took him to a hospital. *Id.* At the direction of one of the officers a doctor forced a tube down Rochin's throat against Rochin's will, and funneled an emetic solution into his stomach inducing vomiting. *Id.* Two capsules were recovered from the vomit, and were found to contain morphine. *Id.*

Though it decided *Rochin* on due process grounds, the Court for the first time applied an exclusionary rule to tangible evidence seized by state officials. Cases coming soon after *Rochin* demonstrated the difficulties with the "shocks the conscience" test. *See* Breithaupt v. Abram, 352 U.S. 432, 437 (1957) (blood test taken while suspect unconscious does not shock conscience); Irvine v. California, 347 U.S. 128, 133 (1954) (*Rochin* involved element of physical coercion—use of stomach pump—not found in illegal surveillance of defendant's home).

Justice Frankfurter, who authored the opinions in both *Rochin* and *Wolf*, dissented in *Irvine*. 347 U.S. at 142 (Frankfurter, J., with Burton, J., dissenting). *Irvine* may have made the demise of *Wolf* inevitable, because to many, it demonstrated the ineffectiveness of diluted forms of the *Weeks* exclusionary rule. *See* Traynor, *supra* note 68, at 324 (decision in *Irvine* evinced Supreme Court's desire for states to implement an exclusionary rule).

74. 364 U.S. 206 (1960).

75. *Id.* at 223. In Byars v. United States, 273 U.S. 28 (1927), the Court had ruled inadmissible in a federal prosecution the fruits of a search conducted by state and federal officers pursuant to a state search warrant that was defective by federal standards. *Id.* at 29-30. Nevertheless, the Court made it clear that participation by federal officials was crucial to the decision. The Court did "not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." *Id.* at 33. According to Justice Stewart's majority opinion in *Elkins*, the Court had removed the doctrinal underpinning for admitting evidence unlawfully seized by state officials in federal prosecutions in *Wolf*, when it held that the fourth amendment prohibition against unreasonable searches and seizures applied to the states through the fourteenth amendment. *Id.* at 213. Justice Stewart wrote:

> For by admitting the unlawfully seized evidence the federal court serves to defeat the state's [that adopted the exclusionary rule on its own] effort to assure obedience to the Federal Constitution. In states which have not adopted the exclusionary rule, on the other hand, it would work no conflict with the local policy for a federal court to decline to receive evidence unlawfully seized by state officers.

Id. at 221. Justice Frankfurter, the author of *Wolf*, dissented. He viewed it as:

> [A] complete misconception of the *Wolf* case to assume, as the Court does as the basis for its innovating rule, that every finding by this Court of a . . . search unreasonable under the Fourth Amendment, constitutes an "arbitrary intrusion" of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment.

Id. at 238 (Frankfurter, J., with Clark, Harlan & Whittaker, JJ., dissenting).

76. *Id.* at 217. The Court stated: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.*

77. 367 U.S. 643 (1961).

78. *Id.* at 655. The Court reasoned that:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the . . . States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be a "form of words," valueless and undeserving of mention in a perpetual

Court had once perceived a kind of natural, immutable affinity between the fourth amendment and the rule, since *Wolf* the Court has seen the relationship between them as the product of judicial artifice, and the rule itself as a judicial construct requiring explicit, pragmatic justification if it is to survive. Thus, although the Court in *Mapp* invoked a concatenation of normative principles to support the extension of the exclusionary rule to the states,[79] the bulk of its opinion was devoted to a defense of the rule on the empirical basis that it has proved to be the only effective means of enforcing the fourth amendment.

Soon after *Mapp*, the Court deterrence as the preeminent purpose of the exclusionary rule. In *Linkletter v. Walker*,[80] the Court declined to apply *Mapp* retroactively:[81] "The misconduct of the police prior to *Mapp* has already occurred and will not be deterred by releasing the prisoners involved. . . . [T]he ruptured privacy of the victims' homes and effects cannot be restored."[82] Although after *Linkletter* deterrence was the dominant purpose of the rule, the Court nevertheless continued to recognize that it also served other purposes, and in *Terry v. Ohio*[83] ringingly proclaimed judicial integrity as a basis for the rule.[84]

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charter of inestimable human liberties, so too, without the rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus . . . .

Id.

79. In support of its application of the exclusionary rule to the states through the due process clause of the fourteenth amendment, the Court stated that the rule was a constitutional privilege and reasoned that no person should be convicted on unconstitutional evidence. *Id.* at 656-57. The Court further justified its application of the rule on the need to avoid a conflict between state and federal law produced when state courts admitted evidence that had been seized by federal officials in violation of the federal constitution. *Id.* at 657-58. The Supreme Court had already banned the use of evidence, seized by state officials in violation of the fourth amendment, in federal courts. *See* note 75 *supra* and accompanying text (discussing *Elkins'* rejection of "silver platter" doctrine). The Court also relied upon the "imperative of judicial integrity." *Id.* at 659 (citing Elkins v. United States, 364 U.S. 206, 222 (1960)). This rationale, however, could not justify application of the rule to the states through the due process clause of the fourteenth amendment. As long as they do not act unconstitutionally, state courts can presumably sully themselves with unlawfully-seized evidence without interference from a federal court.

80. 381 U.S. 618 (1965).

81. *Id.* at 621. Shortly after the Court's decision in *Mapp*, Linkletter, who had been convicted of burglary in Louisiana, sought habeas relief in both state and federal courts, arguing that he had been convicted on the basis of illegally-seized evidence. He appealed from the denial of his motion in district court, and the Fifth Circuit ruled that though his arrest and incident search were unconstitutional, the ruling in *Mapp* should apply only to convictions that had not become final prior to that decision. *Id.* The Supreme Court affirmed. *Id.* at 640. Justice Clark, who had authored *Mapp*, wrote for the Court:

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Id. at 629.

In his discussion of the purpose of the *Mapp* rule, Justice Clark said "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action." *Id.* at 636.

82. *Id.* at 637.

83. 392 U.S. 1 (1968).

84. *Id.* at 12. Although the Court acknowledged that the exclusionary rule's "major thrust is a deterrent one," *id.*, it went on to say that "the rule also serves another vital function—'the imperative of judicial integrity.' Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unchallenged governmental use of the fruits of such invasions." *Id.* at 12-13.

One year after *Terry*, the Court seemingly revitalized the principle that the exclusionary rule vindicates a personal right of the defendant when it reaffirmed its commitment to the fourth amendment standing doctrine[85] in *Alderman v. United States*.[86] Under this doctrine, a motion to suppress unconstitutionally seized evidence can be "successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."[87] This limitation on the range of defendants who can challenge unconstitutional police conduct by invoking the exclusionary rule makes sense only if the rule is conceived of as vindicating a personal right of the accused.[88] It is plainly inconsistent both with the notion that the rule's purpose is to prevent the government from profiting from its own wrongdoing,[89] and with the imperative of judicial integrity.[90]

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85. It is unclear whether "standing" continues as a threshold requirement to invoke the exclusionary rule. In Rakas v. Illinois, 439 U.S. 128 (1978), Justice Rehnquist noted that the question whether there has been a violation of the defendant's fourth amendment rights, which would activate application of the exclusionary rule to deter future violations, is the same question as whether the defendant has standing to make a motion to suppress. *Id.* at 140. Accordingly, the Court concluded that the "analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing." *Id.* In a 1980 case, United States v. Salvucci, 448 U.S. 83, 87 n.4 (1980), Justice Rehnquist confirmed that *Rakas* had abolished standing as a separate inquiry. *See also* Rawlings v. Kentucky, 448 U.S. 98, 104 (1980). He explained that he only used the term "standing" because the term was used in Jones v. United States, 362 U.S. 257 (1960), which the Court overruled in *Salvucci*. United States v. Salvucci, 448 U.S. at 87 n.4. In another 1980 case, United States v. Payner, 447 U.S. 727 (1980), however, Justice Powell still used the term "standing" to deny application of the exclusionary rule because the defendant's fourth amendment rights had not been violated. *Id.* at 731. Perhaps the explanation for this inconsistency is that the term "standing" will continue to be used as shorthand for whether the defendant can invoke the exclusionary rule, despite Justice Rehnquist's efforts to merge the inquiries into one.

86. 394 U.S. 165 (1969).

87. *Id.* at 171-72. The Court in *Alderman* rejected the argument that it should abolish the standing requirement to maximize deterrence because it was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime . . . on the basis of all the evidence which exposes the truth." *Id.* at 174-75.

One commentator has suggested that an improper ex parte communication from then Attorney General John Mitchell to certain justices may have influenced the Court's decision in *Alderman*. Burkhoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 ORE. L. REV. 151, 155 n.16 (1979) (citing E. WARREN, THE MEMOIRS OF EARL WARREN 337-42 (1977)).

88. *See id.* at 162 (*Alderman* reaffirmed general rule that fourth amendment rights are personal; thus, individuals whose own rights not violated have no right to claim exclusionary remedy). Professor Amsterdam has argued that the fourth amendment should be viewed as regulating governmental conduct and not primarily as protecting "atomistic spheres of interest of individual citizens." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974). The standing limitation implies an atomistic conception that is inconsistent with the regulatory conception presupposed by the deterrence rationale.

89. In recent years the Court has not paid much attention to the rationale advanced in earlier decisions, such as Silverthorne v. United States, 251 U.S. 385 (1920), that the government should not be permitted to profit from the wrongdoing of its agents. *Id.* at 392. When government agents obtain evidence against the defendant by violating the fourth amendment rights of third parties, the Court's refusal to relax standing limitations to allow the defendant to invoke the exclusionary rule has the effect of allowing the government to profit from its agents' wrongs. Even though the agents' conduct might have been illegal, the Court has upheld the government's use of the evidence to convict the defendants. Rawlings v. Kentucky, 448 U.S. 98, 109-10 (1980); United States v. Payner, 447 U.S. 727, 735 (1980); Rakas v. Illinois, 439 U.S. 128, 150 (1978).

90. If the Court would not exclude evidence on the facts of United States v. Payner, 447 U.S. 727 (1980), when the government actually advised its agents to violate the fourth amendment, *see* note 91

Moreover, it is also fundamentally at odds with the deterrence rationale. If only the victim of the search can invoke the exclusionary rule, the police will have every incentive to invade the privacy of third parties in the hope of obtaining evidence against the target of their investigation.[91] Nevertheless, the Court in *Alderman* rejected the argument that it should abolish the standing requirement in order to increase deterrence.[92] The Court explained that any incremental deterrence would be too marginal to justify the cost to the public of suppressing probative evidence.[93]

Five years after *Alderman*, whatever life remained in the principle that the exclusionary rule vindicates a personal right of the accused was abruptly extinguished by the Burger Court[94] in *United States v. Calandra*:[95] "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search

infra, it is hard to imagine that the Court would ever be provoked to utilize the "imperative of judicial integrity" as an independent basis for excluding unconstitutionally-seized evidence.

91. The recent case of *United States v. Payner* is illustrative. In *Payner*, the trial court made a finding of fact that the government "affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties," 447 U.S. at 730 (quoting United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977)). Under these circumstances, the application of the exclusionary rule would surely have had a deterrent effect on governmental practices calculated to obtain incriminating evidence by violating the fourth amendment. Nevertheless, even here the Court refused to relax the standing requirement. *Id.* at 735 (interest in deterring illegal searches does not justify exclusion of evidence at instance of party not victim of illegality); Alderman v. United States, 394 U.S. 165, 205-09 (1969) (Fortas, J., concurring in part and dissenting in part) (advocating doctrine of "target" standing). *See also* 3 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 11.3(h) (advocating standing for target of search); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 349-56 (1970) (same).

92. 394 U.S. at 174-75.

93. *Id.*

94. Even before he was elevated to the Supreme Court in 1969, Chief Justice Burger had been an outspoken critic of the exclusionary rule. *See* Smith v. United States, 324 F.2d 879, 881-82 (D.C. Cir. 1963) (per Burger, J.) (court admitted confessions made during illegal detention, refusing to make constitutional rules into "mere technical loopholes for the escape of the guilty") (quoting Stein v. New York, 346 U.S. 156, 196-97 (1952)); Wayne v. United States, 318 F.2d 205, 214 (D.C. Cir.) (per Burger, J.) (court upholds entry into apartment without warrant, rejecting notion of denying protection to society through "mechanical adherence to formalism"), *cert. denied*, 375 U.S. 860 (1963). *See generally* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964). Burger began his attack on the rule as Chief Justice in his dissenting opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). *See* notes 517-30 *infra* and accompanying text (discussing evolution of Chief Justice Burger's position on exclusionary rule).

In *Bivens*, Chief Justice Burger dismissed all but the deterrent rationale for the exclusionary rule, then argued that the rule's history had demonstrated that it was "both conceptually sterile and practically ineffective in accomplishing its stated objective." *Id.* at 415 (Burger, C.J., dissenting). Burger also sowed the seeds of a good faith exception in this dissent, arguing that because the purpose of the rule was deterrence, its application should be limited to willful and intentional fourth amendment violations, and should not apply when the police make "honest mistakes," and "errors of judgment" that "inevitably occur under the pressure of police work." *Id.* at 418.

Ironically, Burger was dissenting in *Bivens* from a decision by the Court that victims of unconstitutional searches and seizures have a private, civil right of action under the constitution itself against federal officials who violate their fourth amendment rights. Burger, who has consistently advocated that the exclusionary rule be replaced by an effective tort remedy, dissented because he felt that it was for Congress, not the courts, to fashion such a right of action. *Id.* at 411-12.

95. 414 U.S. 338 (1974). The Court held that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search because "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." *Id.* at 351. The Court distinguished *Silverthorne Lumber Co. v. United States* on tenuous grounds, noting that "the Court's broad dictum [in *Silverthorne*] has been substantially undermined in later cases." *Id.* at 352-53 n.8; *see* note 53 *supra* (discussing broad reach of exclusionary rule under *Silverthorne*).

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victim," the Court wrote.[96] "Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures."[97] The Court then recast the rationale of the standing doctrine to suit its own purposes, relying on *Alderman* to hold that the exclusionary rule would not bar the use of illegally-seized evidence by a grand jury:

> Despite its broad deterrent purpose, the exclusionary rule . . . as with any remedial device . . . has been restricted to those areas where its remedial objectives are thought most efficaciously served. . . . Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. . . . This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.[98]

The Court thus misread *Alderman*, and its analysis of the standing doctrine is sophistical; the standing limitation was not "premised" on concerns with deterrence, but rather on what was thought to be the personal nature of the right to invoke the exclusionary rule, the very right that the Court in *Calandra* explicitly rejected. In *Alderman*, the Court mentioned deterrence only in responding to the argument that the right to exclude evidence should extend to all defendants.[99]

Despite its questionable reasoning, *Calandra* has set an analytical pattern that the Court has essentially followed ever since. The Court has thus divorced the exclusionary rule from the fourth amendment itself, and has installed deterrence as the rule's preeminent purpose. While the Court occasionally mentions its duty to preserve judicial integrity, that responsibility now requires no more than refusing to admit illegally-seized evidence when to do otherwise would encourage police misconduct.[100] Consequently, the Court

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96. 414 U.S. at 347. The Court also rejected the witness' claim that questions by the grand jury based on private papers seized illegally from him constituted distinct, independent violations of his fourth amendment rights:

> Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally-obtained evidence are only a derivative use of the product of a past unlawful search or seizure. They work no new Fourth Amendment wrong.

Id. at 354.

97. *Id.*

98. *Id.* at 348.

99. 394 U.S. at 174-75. *See also* Jones v. United States, 362 U.S. 257 (1966), *overruled*, United States v. Salvucci, 448 U.S. 83 (1980), in which the standing doctrine is in no way limited to deterrence.

100. In United States v. Peltier, 422 U.S. 531 (1975), the Court noted that although previous decisions had "referred to 'the imperative of judicial integrity' . . . the Court has relied principally upon the deterrent purpose served by the exclusionary rule." *Id.* at 536 (citation omitted). Soon after *Peltier*, in Stone v. Powell, 428 U.S. 465 (1976), the Court stressed that the "imperative of judicial integrity" had played but a "limited role . . . in the determination whether to apply the rule in a particular context." *Id.* at 485. Nevertheless, it was in United States v. Janis, 428 U.S. 433 (1976), that the Court defined the judicial integrity rationale out of operative existence:

presently decides both federal and state cases from the perspective of putative deterrent effect alone.

One problem is that this formula, balancing the marginal increment in deterrence that would be achieved by applying the exclusionary rule in a collateral setting against the putative costs to society,[101] appears to be skewed.[102] Because the Court begins its analysis skeptical that the actual deterrent effect of the exclusionary rule can even be measured,[103] all cases seem to come out in

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> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

Id. at 458 n.35.

This may sound harmless enough, but it is important to remember that in United States v. Calandra, 414 U.S. 338, 348 (1974), the Court had ruled that the accused has no personal constitutional right to have unlawfully-seized evidence excluded at trial. Therefore, because the Court "commits" no constitutional violation by admitting illegally-seized evidence, judicial integrity comes into play only when the Court "encourages" constitutional violations.

Although under the *Janis* analysis the "imperative of judicial integrity" is functionally coextensive with the deterrence rationale, and will not, it appears, have any operative significance, it is worthwhile to recognize that the *Janis* formulation appears to "constitutionalize" deterrence. There now seems to be a constitutional requirement to impose the exclusionary rule in contexts where the failure to do so would demonstrably encourage unconstitutional police conduct.

This "requirement" could be the basis for an attack on the constitutionality of the good faith exception. Such an argument would begin with the language of the fourth amendment: "[T]he *right of the people to be secure* . . . against unreasonable searches and seizures shall not be violated . . . ." U.S. CONST. amend. IV (emphasis added). The italicized words suggest that this is not simply an individual right to be free from unreasonable searches and seizures, but a right of the people of our society as a whole to enjoy a sense of confidence that their privacy will not be unnecessarily invaded by the government. This, in turn, imposes on all governmental institutions, and not just the police, the requirement that they act to ensure that the people can feel secure from unreasonable intrusions by government agents. As expressed in *Janis*, efforts to deter police misconduct are constitutionally mandated.

If we assume that the level of deterrence presently achieved by the exclusionary rule is constitutionally required, then inroads on the rule that would result in considerably more misconduct are unconstitutional unless other compensatory deterrent mechanisms are enacted. Such mechanisms are unlikely to come from legislatures, which "have not been, are not now, and are not likely to become sensitive to the concern of protecting [the privacy of] persons under investigation by the police. . . . [T]here will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control." Amsterdam, *supra* note 88, at 378-79. If this article is correct that a good faith exception will dilute the probable cause standard and stem the development of fourth amendment law, then such an exception diminishes the security to which each of us is entitled under the fourth amendment. Unless other measures will restore that level of security, the good faith exception is itself unconstitutional.

101. *See* notes 105-10 *infra* and accompanying text (discussing permissible uses of illegally-seized evidence).

102. Typically, the Court first suggests that the rule's impact on police conduct is uncertain even when its remedial objectives are thought to be most efficacious—in deterring police misconduct aimed at seizing evidence for the government's use in a criminal prosecution of the victim of the misconduct. Then, the Court reasons that even assuming the efficacy of barring this use of the evidence, the additional, marginal deterrent effect produced by forbidding the use of the evidence in some collateral way surely does not outweigh the cost to society in terms of law enforcement or the search for truth.

103. In *Elkins*, the Court recognized that "it is hardly likely that conclusive factual data could ever be assembled" that would demonstrate the deterrent effect of the exclusionary rule on police misconduct. Elkins v. United States, 364 U.S. 206, 218 (1960). Ever since *Elkins*, scholars have tried to measure the impact of the exclusionary rule on police misconduct, but the Court has viewed their results as "flawed." United States v. Janis, 428 U.S. 433, 450 & n.22 (1976).

Because of the "high price" to law enforcement extracted by the exclusionary rule, the Chief Justice has demanded that its proponents make a "clear demonstration" of its deterrent value. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). Nevertheless, as one commentator has charged, the Chief Justice's assignment of the "burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative.

favor of the government.[104] Unlawfully seized evidence is now admissible in grand jury proceedings,[105] to impeach the defendant's testimony at his criminal trial,[106] in civil proceedings to collect federal wagering taxes when the ille-

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The Chief Justice's assignment of the burden is merely a way of announcing a predetermined conclusion." Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332-33 (1973).

Many scholars have undertaken the challenge to study empirically the impact of the exclusionary rule. In 1970, Professor Oaks, in a widely cited article, concluded that the proponents of the rule had failed to demonstrate that it had any deterrent effect. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 678 (1970). He offered several imaginative—though in the end fruitless—suggestions for trying to measure empirically the rule's impact on police conduct. *Id.* at 732-34. Some of the early efforts to follow through on these suggestions have been discredited. For a devastating criticism, see Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974). Yet this research is still frequently cited as being authoritative. *See* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 225 n.4 (1978).

A survey of later studies leads to the conclusion that the impact of the exclusionary rule cannot be empirically measured. *Compare* Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398, 403 (1979) (existing data do not show whether exclusionary rule deters police misconduct) *with* Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is A Deterrent to Police?*, 62 JUDICATURE 404, 408 (1979) (proponents of rule have not met burden of proof that exclusionary rule is actually deterrent). *See also* Canon, *A Postscript on Empirical Studies and the Exclusionary Rule*, 62 JUDICATURE 455 (1979) (inferences can be drawn from data even though data not absolutely reliable); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974) (empirical data support inference that exclusionary rule is deterrent); Geller, *supra* note 70 (comprehensively surveying arguments for and against exclusionary rule, concluding that exclusionary rule does deter, but recommending that legislature also consider other deterrent mechanisms); Schlesinger, *A Reply to Professor Canon*, 62 JUDICATURE 457 (1979) (criticizing Canon's 1974 empirical study); Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & CRIMINOLOGY 373 (1974).

It is one thesis of this article that these efforts to measure the impact of the exclusionary rule have been largely misdirected because they rest on an unduly narrow conception of deterrence. Properly understood, the deterrent effect of the exclusionary rule is manifest. *See* text accompanying notes 161-200 *infra*.

104. This skepticism has not, however, led the Court to abandon the rule in its central application:

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions.

Stone v. Powell, 428 U.S. 465, 492-93 (1976).

105. United States v. Calandra, 414 U.S. 338, 349 (1974) (benefit of extending exclusionary rule to grand jury proceedings outweighed by potential injury to functions of grand jury). Professor LaFave argues that *Calandra* virtually distinguishes Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (grand jury may not subpoena documents when knowledge of their existence and contents derived from illegal search) "out of existence." 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 1.4; at 64; *see* United States v. Calandra, 414 U.S. at 352 n.8 (*Silverthorne* distinguishable from present case in significant respects and "certainly not controlling"). For an effective criticism of *Calandra*, see Critique, *supra* note 103.

106. United States v. Havens, 446 U.S. 620, 627-28 (1980) (government may impeach defendant's statements in cross-examination suggested by direct examination with illegally-obtained evidence that is inadmissible in direct case). The Court had previously ruled in Walder v. United States, 347 U.S. 62 (1954), that a defendant who perjured himself on direct examination could be impeached with evidence illegally seized from him in connection with an entirely different prosecution. *See id.* at 65 (defendant may not use suppressed evidence as shield to perjurious testimony). *Havens*, however, would allow impeachment of statements elicited on cross-examination with evidence seized in the instant case. It would, in effect, permit impeachment with illegally seized evidence virtually every time the defendant testifies. What the Burger Court did in *Havens* was much like what it had earlier done in Harris v. New

gal search was conducted by state officials,[107] and in the trials of defendants who are the targets, though not the victims, of illegal searches carefully designed to circumvent application of the exclusionary rule.[108] Federal habeas corpus relief will be denied to a state prisoner if he had a "full and fair opportunity" to litigate his fourth amendment claim in a state criminal proceeding.[109] A new fourth amendment decision will not be applied retroactively, even to cases pending direct review at the time of the decision.[110]

Another problem with the Court's approach is that the cumulative effect of such exceptions may be great, even though the marginal loss of deterrence produced by the refusal to extend the exclusionary rule in a particular context may seem small. If, for example, the police unlawfully stop and search a car and its occupants, it is likely that some of the passengers would not have standing to challenge admission of unlawfully-seized evidence, or that the evidence will be admitted either to impeach the testimony of a defendant, or to secure an indictment in a grand jury proceeding. Although the police may not be thinking about any particular one of these permissible collateral uses of unlawfully-seized evidence, they may well go ahead with the unlawful search, confident that in one way or another it is likely to pay off.

By authorizing the use of unlawfully-seized evidence in collateral settings, the Court has so reduced the number of occasions in which the exclusionary rule might be applied that members of the Court[111] have predicted that the Court may abandon the rule altogether. So far, however, only Chief Justice Burger and Justice Rehnquist[112] have expressed a desire to eliminate the rule. During the last six years, in fact, a majority of the Court has applied the exclusionary rule as the means of compelling police respect for an enlarged range of protected interests.[113] The Court has not yet denied the application of the rule

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York, 401 U.S. 222, 225-26 (1971) (statements excluded because of *Miranda* violations may be used to impeach credibility of defendant's trial testimony). For a discussion and criticism of *Harris*, see Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). Ten years later, there is no longer reason to be anxious, just depressed.

107. United States v. Janis, 428 U.S. 433, 454 (1976) (societal costs of excluding evidence unlawfully seized by state officers in federal civil proceeding sufficiently outweigh deterrent effect on state police). *See generally* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 1.5, at 90-95 (discussing and criticizing *Janis*).

108. United States v. Payner, 447 U.S. 727, 731 (1980) (defendant may invoke exclusionary rule only when illegal conduct invaded his legitimate expectation of privacy, not that of third party); *see* note 91 *supra* (discussing *Payner*).

109. Stone v. Powell, 428 U.S. 465, 493-94 (1976) (contribution of federal review of state prisoners' search and seizure claims small in relation to costs). *Stone v. Powell* all but explicitly overruled Kaufman v. United States, 394 U.S. 217, 228 (1969) (vindication of prisoners' constitutional rights outweighs value of finality in criminal judgments).

110. United States v. Peltier, 422 U.S. 531, 538-39 (1975) (retroactive application of exclusionary rule does not further its deterrent purpose).

111. *See* United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., with Douglas & Marshall, JJ., dissenting) (expressing "uneasy feeling" that Court prepared to abandon exclusionary rule in search and seizure cases). *See also* note 32 *supra* and accompanying text.

112. *See* California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay) (exclusionary rule should be overruled for both federal and state criminal trials); *cf.* Stone v. Powell, 428 U.S. 465, 500-01 (1976) (Burger, C.J., concurring) (overruling exclusionary rule would inspire alternative statutory remedy for violation of fourth amendment). *See also* note 32 *supra*.

113. The Court has ruled unconstitutional, and suppressed the fruits of: an arrest made without probable cause or a warrant, Brown v. Illinois, 422 U.S. 590, 601 (1975) (*Miranda* warnings neither remedy nor deter fourth amendment violations); random traffic stops, Delaware v. Prouse, 440 U.S. 648, 663 (1979) (privacy interference and fourth amendment violation to stop automobile without ar-

in a criminal prosecution in which the defendant was the victim of a violation of then-prevailing fourth amendment standards, regardless of whether the offending officer acted in good or bad faith.

Unlike the majority of the Supreme Court, the Fifth Circuit decided that it *does* make a difference whether the offending police officer was acting in good or bad faith.[114] When the appeals court adopted the good faith exception, it claimed that it was doing no more than the Supreme Court has already done—restricting the application of the exclusionary rule to those instances in which it will deter police misconduct.[115] In the Fifth Circuit's view, a police officer who acted in good faith when he violated the fourth amendment cannot be deterred because, by hypothesis, he did not know that what he was doing was unlawful.

Despite a superficial similarity to the analysis that the Supreme Court has developed to withhold application of the exclusionary rule when its deterrent effect would only be incremental, the Fifth Circuit in *Williams* actually misapplied the analysis. Although limiting the rule's application, as the Supreme Court has done, often gives the police a variety of incentives to ignore the commands of the fourth amendment, the *Williams* good faith exception would effectively preclude courts from even articulating those commands. Accordingly, *Williams* is a significant departure from the recent course of Supreme Court case law. It is one thing to deny application of the rule when it will achieve only marginal increments of deterrence; it is quite another to make an exception to the rule that will have the effect of discouraging general police compliance with the fourth amendment.

This article will show that the *Williams* good faith exception is inconsistent with the Fifth Circuit's professed fidelity to the goal of deterrence. Because one mistake of those who advocate the good faith exception flows from an misunderstanding of how the exclusionary rule works as a deterrent, this article will next discuss the deterrent function of the rule itself, and then the ways in which the good faith exception would cripple the rule's operation.

III. THE EXCLUSIONARY RULE AS A DETERRENT

A. THE QUANTUM OF DETERRENCE THE EXCLUSIONARY RULE MUST GENERATE

Although there exists a vast, if ultimately inconclusive, body of literature on the effectiveness of the exclusionary rule as a deterrent,[116] surprisingly little

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ticulable and reasonable suspicion); investigatory arrests for questioning, Dunaway v. New York, 442 U.S. 200, 216 (1979) (detention for custodial interrogation violates interests protected by fourth amendment); warrantless arrests in nonpublic places, Payton v. New York, 445 U.S. 573, 601 (1980) (warrantless entries into homes violates "overriding respect for the sanctity of the home"); warrantless searches of closed containers seized incident to arrest, United States v. Chadwick, 433 U.S. 1, 11 (1977) (sufficient privacy interests in personal effects placed inside double-locked footlocker to entitle defendant to protection of fourth amendment); and entries into the homes of third parties without a search warrant to effect an arrest, Steagald v. United States, 101 S. Ct. 1642, 1648 (1981) (arrest warrant does not entitle police to violate third party's privacy interest in his home).

114. United States v. Williams, 622 F.2d 830, 846-47 (5th Cir. 1980) (en banc) (second majority opinion) (adopting good faith exception to application of exclusionary rule), *cert. denied*, 449 U.S. 1127 (1981).

115. *Id.* at 847.

116. *See* note 103 *supra*. *See generally* Burger, *supra* note 94, at 11-12 (concluding that exclusionary

attention has been paid to the threshold issue of what amount of deterrence the rule must generate to justify itself. The question is obviously important; it is also complex. Nevertheless, at least a partial answer is available. The exclusionary rule is justified if suppressing evidence will result in at least the same pay-off in increased protection of privacy, for an equivalent cost in the conviction of wrongdoers, as does the probable cause requirement of the fourth amendment when the police adhere to it. The probable cause requirement reflects a trade-off between the same competing values that are in balance when the issue is whether to suppress evidence on account of a fourth amendment violation. The probable cause requirement compels society to pay a cost in the apprehension of criminals, or in the recovery of evidence of crime, for the sake of the people's privacy. It is surely legitimate for courts to suppress evidence if the lost evidence is counterbalanced by greater security for our "persons, houses, papers, and effects," to the same extent as when, at the same cost, the police comply with the mandate of the fourth amendment not to seize or search without probable cause.[117]

The probable cause requirement is the fundamental test for the constitutionality of most searches or seizures.[118] Before an officer can make an arrest, he

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rule has no substantial deterrent effect); Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1145-58 (1959) (suggesting data on deterrence inconclusive); O. Fiss, *supra* note 103, at 672-709, 720-57 (concluding that exclusionary rule without demonstrable direct deterrent effect but best existing device for enforcing fourth amendment); Paulsen, *Law and Police Practice: Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 74-76 (1957) (concluding that exclusionary rule most effective remedy because provides incentive to police departments to educate officers and disassociates courts from systematically illegal behavior).

117. Thus, the legitimacy of the exclusionary rule can be established if it can be shown that the balance of its benefits against its costs is no worse than the balance inherent in the probable cause requirement. The converse, however, does not necessarily follow. It may be that the exclusionary rule is constitutionally legitimate or even constitutionally compelled although the probable cause requirement is more cost-effective. It is possible that some alternative justification can sustain the exclusionary rule, even as a purely prophylactic device, despite its costliness in comparison with the probable cause standard. This article does not pursue that point.

118. In almost every situation, a police officer must have probable cause before searching or seizing. *See* Dunaway v. New York, 442 U.S. 200, 210, 216 (1979) (probable cause required to seize suspect and to transport him to headquarters for interrogation). Some types of detentions and searches, however, are inherently less intrusive than others. If a police officer lacks probable cause but has reasonable articulable suspicion that a person is committing or has committed a crime, the officer may approach the suspect, identify himself, and question the suspect briefly. If, furthermore, the officer has an articulable reason to suspect that the person may be armed and dangerous, he may conduct a limited patdown of the suspect's outer clothing for weapons. Terry v. Ohio, 392 U.S. 1, 30 (1968). The police may conduct searches and seizures in a small class of additional cases on a lesser standard than probable cause if their conduct is deemed relatively unintrusive and the law enforcement need is deemed great. *See, e.g.*, Michigan v. Summers, 101 S. Ct. 2587, 2595 (1981) (probable cause not required for police to detain occupant during valid warrant search of house for contraband); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam) (probable cause not required for police to order driver out of lawfully-stopped car); Adams v. Williams, 407 U.S. 143, 147-48 (1972) (less than probable cause sufficient for police to perform limited search of driver sitting in car parked in high crime area late at night when officer had tip that driver armed).

Other searches that are permitted without probable cause are, for the most part, the so-called administrative or regulatory searches. These include searches of businesses to enforce health and safety regulations, border searches, and airport searches. *See* Donovan v. Dewey, 101 S. Ct. 2534, 2541-42 (1981) (statute authorizing warrantless inspections of mines and stone quarries does not violate fourth amendment); United States v. Ramsey, 431 U.S. 606, 617 (1977) (border searches not subject to warrant provisions of fourth amendment and do not require probable cause); United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973) (pre-boarding screening of passengers and carry-on luggage at airport gate does not violate fourth amendment even though conducted without warrant). These searches have been upheld primarily because they occur as part of a highly visible, regulatory or administrative scheme of general

must have probable cause to believe that the suspect committed a crime.[119] Likewise, before he may conduct a search or seize property, an officer must have probable cause to believe that his efforts will yield either contraband or the fruits, instrumentalities, or evidence of a crime.[120]

Both the exclusionary rule as a deterrent and the probable cause requirement are regulatory. Each aims to control law enforcement behavior, the probable cause requirement through a mandate to law enforcement officers and reviewing magistrates, and the exclusionary rule through a mandate to trial courts. Further, they both strike a balance between the legitimate needs of law enforcement and the right of the citizen to be free from unreasonable governmental intrusion.[121] Although the Supreme Court has never precisely defined probable cause,[122] its meaning is surely very close to "more likely than

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application, so that there is little likelihood that the searches will be conducted in an arbitrary or discriminatory manner. When courts have concluded that the regulatory scheme left too much discretion to those administering it, they have struck down the statutes and suggested guidelines to ensure impartial application. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (random stop of automobiles for license and registration check constitutes unreasonable search under fourth amendment; Court suggests that questioning of all drivers at fixed stop might be permissible); Marshall v. Barlow's, Inc., 436 U.S. 307, 324 (1978) (warrantless inspections under Occupational Safety and Health Act violate fourth amendment; reasonableness of other warrantless administrative searches will depend upon specific enforcement needs and privacy guarantees of particular statute); See v. City of Seattle, 387 U.S. 541, 545-46 (1967) (administrative search of portion of commercial premises not open to public permissible only through warrant procedure; licensing programs requiring inspections will be examined on case-by-case basis in future).

Moreover, no stigma attaches to the targets of these searches. The individuals subject to them are members of morally neutral classes, not of traditionally disfavored economic or racial subgroups who are likely to be, or at least perceive themselves to be, singled out for unfair treatment and whose privacy government officials may be prone to undervalue. Finally, individuals may be able to avoid regulatory searches by altering their conduct, and often are forewarned as to when and where the searches will occur.

119. Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (probable cause required for arrest). In Beck v. Ohio, 379 U.S. 89 (1964), the Supreme Court explained the test for the validity of an arrest as:

> [W]hether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Id. at 91.

120. *See* Warden v. Hayden, 387 U.S. 294, 309-10 (1967) (if probable cause exists, police may search for evidence as well as fruits, instrumentalities, and contraband).

121. *See* Brinegar v. United States, 338 U.S. 160, 176 (1949) (probable cause standard provides balance between desire to prevent unreasonable invasions of privacy and attempt to give flexibility to law enforcement).

122. The Supreme Court has suggested that probable cause does not exist unless the information at hand singles out a particular individual. *See* Wong Sun v. United States, 371 U.S. 471, 483-85 (1963) (no probable cause to arrest when agent could not know whether defendant was in fact person described by informant); Johnson v. United States, 333 U.S. 10, 16 (1948) (no probable cause for arrest when police officers did not know identity or number of occupants of room from which they detected odor of opium). *See generally* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 45, § 3.2(e), at 477-79.

The Model Code of Pre Arraignment Procedure (Proposed Official Draft, 1975) would permit investigative arrests on the less stringent standard of "reasonable cause." *Id.* at 14. The Code draftsmen contend that this standard is not foreclosed by present law, citing several state court decisions and one decision from a United States Court of Appeals. *Id.* at 294.

In Dunaway v. New York, 442 U.S. 200 (1979), however, the Supreme Court pulled the rug out from under this recommendation. In *Dunaway*, the Court held that probable cause is required for an investigatory arrest, *id.* at 214, and emphasized that the standard for probable cause is stringent:

> . The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised [by al-

not."[123] Speaking generally, the police may arrest a person who more likely than not has committed, or is committing, an offense. Similarly, they may search if more likely than not they will find the incriminating evidence they seek. Thus, in either of these situations, the police must reasonably believe that the likelihood that they will obtain their goal—by bringing a guilty person to book or by recovering evidence of his offense—is greater than fifty percent. Over a period of time, therefore, the fourth amendment tolerates the arrest or search of x number of innocent people if, correspondingly, there are $x + 1$ arrests of the guilty or searches that pay off. To state the formula the other way, for y number of fruitful police invasions of people's privacy, there must be no more than $y - 1$ fruitless invasions.[124] Otherwise, the police are searching and seizing when their suspicions do not rise to the level of probable cause.

The analogy between the probable cause standard and the exclusionary rule is most striking when we consider how the probable cause mandate operates to forbid a search or seizure. Under that standard, the police must forbear when the likelihood that their suspicions will prove justified is merely fifty percent or less. Thus, the fourth amendment requires that, over time, society tolerate z number of guilty persons escaping arrest or avoiding a search that would have uncovered evidence of their delicts, if, correspondingly, there are z or more innocent persons who thereby escape an unnecessary police intrusion.[125] Pre-

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lowing an exception to the requirement for investigatory arrests]. "The requirement of probable cause has roots that are deep in our history." Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest."

Id. at 213 (quoting Henry v. United States, 361 U.S. 98, 100 (1959)). The Court then went on to reject a proposed "multifactor balancing test," *id.* at 213, which would require the police, and then the reviewing court, to weigh "the manner and intensity of the interference, the gravity of the issue involved and the circumstances attending the encounter," in judging the lawfulness of an arrest for further investigation. *Id.* at 211 n.14.

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases . . . . A single, familiar standard is essential to guide police officers, who have neither the time nor the expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

Id. at 213-24 (footnote omitted).

123. In *Brinegar v. United States*, the Supreme Court noted that: "Probable cause exists 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). Such a belief would not be warranted if the facts available to the officer made it as likely as not that the officer was wrong.

124. This section has drawn a correspondence between fruitful and fruitless searches and seizures, rather than between legal and illegal police conduct because that is the correspondence that the probable cause standard itself suggests. The suppression of evidence of one fruitful but illegal search is justified if one fruitless search is thereby prevented. A somewhat more complicated question is how many future illegal searches (fruitful and fruitless alike) must be deterred in order to justify suppression. As the point seems largely irrelevant to this discussion, it has not been pursued.

125. This discussion assumes for the sake of simplicity that a person who secretes evidence of a crime is in fact guilty of an offense. The police may, however, invade a person's privacy, no matter how innocent he is, if they have sufficient grounds to believe that the search will yield evidence. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978) (critical element of reasonable search not that owner of property suspected of crime, but rather that police have reasonable cause to believe that evidence located on owner's property).

cisely the same values are in conflict when the decision is whether illegally-seized evidence should be suppressed. Society's right to apprehend and convict the guilty is pitted against the people's right to be secure against governmental intrusion. The exclusionary rule is amply justified, then, if its operation replicates the results of the probable cause requirement: that is, if the suppression of the fruits of one illegal search or seizure leads to the avoidance of a single fruitless police intrusion in the future.[126]

The warrant requirement of the fourth amendment provides further support for adopting the probable cause standard as the proper measure for justifying the exclusionary rule. Although the argument for the suppression of evidence for a violation of the warrant requirement is more attenuated than for a direct violation of the probable cause requirement,[127] both the warrant requirement and the exclusionary rule have the same overarching purpose: protection against searches and seizures conducted without probable cause. The procedural requirements of the warrant clause implement the probable cause standard. The warrant requirement allows a magistrate to assess independently the presence of probable cause before the policeman acts.[128] Similarly, the particularity requirement of the warrant clause seeks to ensure that the officer will search only those areas, and seize only those items, with respect to which the magistrate has found probable cause.[129] Suppression motivates the police to comply with the warrant requirement in the future, thereby increasing reliance on warrants and reducing the likelihood that an officer will arrest or search without probable cause.[130]

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126. Although for the sake of convenience the argument above is in terms of the discrete quantum of deterrence that might flow from a single suppression order in a particular criminal prosecution, the question should usually be considered in a broader context. Our concern is ultimately with a viable system of suppression. A single suppression order in a single case may have little or no discernible effect on future police conduct; yet consistent application of the exclusionary rule by a reasonable and resolute judiciary could significantly alter police behavior.

127. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted). Because suppression of evidence for a violation of the warrant requirement does not depend upon the probability of a successful search or seizure, application of the exclusionary rule when there has been a violation of the warrant requirement does not directly replicate the balance that the probable cause standard establishes. Nevertheless, because the warrant requirement implements the probable cause standard, it is possible to measure the deterrent effect of suppressing evidence for warrant clause violations in the same manner as for violations of the probable cause requirement.

128. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297, 317 (1972) (review by neutral magistrate mandatory); Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) (State Attorney General may not issue warrant); Mancusi v. DeForte, 392 U.S. 364, 371 (1968) (use of subpoena *duces tecum* as search warrant improper because circumvents requirement of review by magistrate); Johnson v. United States, 333 U.S. 10, 14 (1948) ("neutral and detached magistrate" better judge of probable cause than "officer engaged in the often competitive enterprise of ferreting out crime").

129. *See* Andresen v. Maryland, 427 U.S. 463, 480-82 (1976) (fourth amendment prohibits general warrants; valid search warrant limited to evidence of suspected crime); Berger v. New York, 338 U.S. 41, 59-60 (1967) (wiretap statute failed particularity requirement when it only required names and addresses of persons whose conversations were to be audited).

130. Application of the exclusionary rule to violations of the warrant requirement does not impose greater costs than application of the rule to searches and seizures made without probable cause. If an officer is unable to obtain a warrant in time to conduct a search, the absence of the warrant is likely to be excused under the "exigent circumstances" doctrine, and the evidence admitted. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit of suspect justifies warrantless entry); Schmerber v. California, 384 U.S. 757, 770 (1966) (officers' reasonable belief that evidence would be destroyed justified withdrawing blood for alcohol test from unconscious accident victim); McDonald v. United States,

Despite the similarities between the probable cause requirement and the exclusionary rule, the disparate amount of public attention that their effects receive constitutes one important difference. The costs of the exclusionary rule are immediately apparent; its benefits are only conjectural. When courts apply the rule, they deprive law enforcement officers of incriminating evidence. In contrast, any police misconduct that would have occurred but for the deterrent effect of the suppression order is purely speculative. On the other hand, when the police do not search because they believe they lack probable cause, the public is not aware that potential evidence is lost. Further, in the unlikely event that the public becomes aware of a decision not to search, the benefits are apparent. An individual's privacy remains intact while the cost is merely conjectural: it cannot be known if evidence was in fact lost. Th[us] although the cost of adhering to the requirements of the fourth amendment a[nd] the cost of applying the exclusionary rule are similar, the exclusionary rule "rubs our noses in it."[131]

B. TYPES OF DETERRENCE

As the preceding section has demonstrated, the probable cause standard suggests a threshold level of deterrence that would justify the continued existence of the exclusionary rule. In order to determine whether the rule does adequately prevent police misconduct, this article considers three distinct types of deterrence. Professor Oaks identifies the first two types: "special deterrence," which describes the effect on the particular officer who violated the fourth amendment and has had evidence suppressed, and "general deterrence," the name for the rule's restraining influence on other officers.[132] There is yet a third form of deterrence, "systemic deterrence," that Professor Oaks overlooks. This article uses the term systemic deterrence to describe the rule's effect on individual police officers through a police department's institutional compliance with judicially articulated fourth amendment standards. As developed below, this process is most visible when the police must respond to changes in

335 U.S. 451, 454-55 (1948) (imminent danger to innocent party, threat of destruction of evidence, and possible flight by suspect justify warrantless search and seizure); Johnson v. United States, 333 U.S. 10, 15 (1948) (same). If courts without hesitation suppressed evidence for all purposes whenever an officer improperly proceeded without a warrant, the rational police officer, erring on the side of caution if uncertain of whether a warrant was necessary, would always obtain a warrant when required and practicable. He would have nothing to lose by complying with the warrant requirement, and nothing to gain from disobeying.

The exclusionary rule as a result would be extremely cost-effective. At virtually no cost, it would achieve nearly complete compliance with the warrant requirement. Any exceptions to the exclusionary rule that might tempt an officer to dispense with a warrant would not only impair the right of the people to be secure from unjustified searches and seizures, but also result in unnecessary loss of evidence. Thus if an officer hoped that, despite his failure to obtain a warrant, the evidence might nevertheless be useful against a defendant without standing, *see* United States v. Salvucci, 448 U.S. 83, 85 (1980), as impeachment evidence, *see* United States v. Havens, 446 U.S. 620, 627-28 (1980), or in the prosecution's case-in-chief if the officer acted in good faith, *see* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) (second majority opinion), *cert. denied*, 449 U.S. 1127 (1981), he would be more likely to ignore the warrant requirement. Yet, if officers are led to miscalculate, the public suffers a double loss. Its privacy is less secure, and criminals benefit from the suppression of probative evidence.

131. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974).

132. Oaks, *supra* note 103, at 709.

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134. Oaks, *supra* note 103

135. *Id.*

136. *Id.* at 710.

137. *Id.* at 731 n.193.

138. J. HIRSCHEL, FOURTH [AMENDMENT]
district attorneys, and defens[e]
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The statement: "An important [thing]
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fourth amendment law.[133] Further, the rule prevents violations of fourth amendment standards by facilitating the articulation of the standards themselves. The exclusionary rule works systematically through these means to make privacy rights more secure.

Special Deterrence. Oaks defines "special" deterrence as the prevention of future misconduct by one particular officer through the imposition of an individual sanction.[134] In Oaks' analysis, the exclusionary rule does not even attempt to perform this function because it does not impose any direct punishment.[135] Oaks doubts that the disappointment an officer experiences when a court suppresses evidence will motivate him to change his ways in the absence of any formal departmental action.[136] Yet elsewhere in his article, when he describes what he learned one summer as an Assistant State's Attorney in Chicago, he relates that after the prosecutor lost a motion, he "found a significant fraction of patrolmen who were leaving the courtroom confused and bitter about the action taken, attributing it to the venality of the judges or prosecutor (or both), and having no idea whatever of how to modify their own conduct to avoid a repetition."[137] Whatever else his observations may show, Oaks has described police officers who care that evidence has been lost and who presumably would want to avoid this result in the future. Further, an empirical study of police officers' responses to questionnaires revealed that a significant number of officers felt "a personal loss" when a court suppressed evidence they had seized.[138] Thus, it is reasonable to conclude that the threat of the exclu-

133. Although Oaks discusses only special and general deterrence, "systemic" deterrence is somewhat different. The effect of systemic deterrence is self-evident as police departments continue to issue directives to their officers. Its success rests on the assumption that police officers follow department orders. Police department responses include issuance of direct orders, dissemination of fourth amendment decisions, training both new and experienced officers, and formation of policy on police conduct in search and seizure situations. *See* notes 162-74 *infra* and accompanying text (discussing department reactions to Delaware v. Prouse, 440 U.S. 648 (1979)).

134. Oaks, *supra* note 103, at 709.

135. *Id.*

136. *Id.* at 710.

137. *Id.* at 731 n.193.

138. J. HIRSCHEL, FOURTH AMENDMENT RIGHTS 86-87 (1979). Hirschel requested police officers, district attorneys, and defense attorneys to register their agreement scaled from zero to 100 to several statements relating to the deterrent effect of the exclusionary rule. A score of 100 would indicate total agreement. The police overall mean in response to the statement, "A police officer feels a personal loss when evidence he has seized is excluded in a court" was 58.8. *Id.* In response to the statement, "The exclusion of illegally seized evidence in court proceedings discourages police officers from making many kinds of searches they would otherwise make," the police overall mean was 65.5. *Id.* at 84-85. The statement, "An important factor in a police officer's decision to search is whether the article he is looking for will be admissible as evidence in court" elicited a police overall mean response of 56.9. *Id.* at 85.

Though Hirschel contends that his study reveals that the exclusionary rule is an ineffective deterrent, his data seem to belie his conclusion. Officers in his study were asked whether they would search in certain hypothetical situations. But it is simply impossible to determine to what extent a police officer views his personal views of what searches and seizures are reasonable to the operation of the exclusionary rule and resulting court decisions giving content to the fourth amendment. Thus, even though the officers in Hirschel's studies tended to a broader view of what was reasonable than the view that the courts in fact held (each of Hirschel's questions derived from a published appellate court decision), the officers' views might nonetheless reflect the influence of the courts. Most importantly, the police apparently share the view that a search is reasonable only if it is likely to uncover evidence and that an arrest is reasonable only if the person arrested is probably guilty. In other words, they accept the probable cause standard as the test of reasonableness. There is, of course, no inherent reason why this should be

sionary sanction does influence individual police officers.

General Deterrence. The exclusionary rule not only deters the police officer who has had evidence suppressed from further unlawful searches, but also deters law enforcement officers who are aware of the rule yet have not personally experienced the loss of evidence. Oaks describes this effect as general deterrence and divides it into two subcategories: "direct," with immediate effects, and "indirect," entailing long term results.[139]

Direct deterrence, in Oaks' analysis, requires effective communication between the police department and police officers to be successful.[140] Other considerations important to the effectiveness of direct deterrence include an officer's understanding of fourth amendment law, his fear of suppression, and the importance to him of not violating the fourth amendment.[141] The direct deterrent effect of the exclusionary rule depends upon an individual officer's perception of the relative costs of conformity and nonconformity with the rule.[142] Indirect deterrence, on the other hand, depends upon the extent to which police officers' values reflect fourth amendment standards.[143] A threat of punishment helps to develop patterns of conforming behavior that influence an officer's conduct even after he has ceased to weigh the pros and cons of observance in an individual case.[144] Further, Oaks contends that the exclusionary rule provides a police officer with an argument to justify his own compliance with fourth amendment standards, when his fellow officers do not regard such compliance as desirable in its own right.[145]

Operation of Special and General Deterrence. In Oaks' view, the exclusionary rule does not achieve very much deterrence through either of these mechanisms because the requisites for effective deterrence are lacking.[146] Specifically, Oaks contends that: (1) suppression affects only police behavior aimed at successful prosecution,[147] (2) police officers as a group do not share a system of values that emphasizes protection of constitutional rights,[148] and (3) the exclusionary rule attempts to enforce a poorly-communicated and confusingly-articulated set of standards.[149]

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so. Certainly, societies exist where the police can search, arrest, or demand documentary evidence of identification on the slightest suspicion or even at will. That the police in our society perceive "reasonableness" as they do may well be a function of court decisions and the operation of the exclusionary rule. Thus, although there is naturally a gap between the views of the courts and the views of the police, the width of the gap might be fairly constant. Police perception of reasonableness will shadow court rulings as long as the courts continue to interpret and enforce the fourth amendment by suppressing evidence obtained in violation of its standards. For a discussion of this neglected, educative function of the law, see F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 77-83 (1973).

139. Oaks, *supra* note 103, at 710-12.
140. *Id.* at 710.
141. *Id.* at 710-11.
142. *Id.* at 710.
143. *Id.* at 711.
144. *Id.*
145. *Id.* at 712.
146. *Id.* at 720.
147. *Id.* at 720-25.
148. *Id.* at 727-29.
149. *Id.* at 730-32. Oaks also suggests other limitations upon the effectiveness of the exclusionary

Oaks' first criticism, that the exclusionary rule may not deter police conduct aimed at goals other than conviction, is beside the point. The only sensible measure of the deterrent value of the rule is the number of illegal searches and seizures it prevents, not the number that occur despite it. The fallacious argument that the rule is a failure because it cannot deter some kinds of illegal searches often recurs in discussions of deterrence. In their study of deterrence, Zimring and Hawkins dub it the fallacy of "The Warden's Survey."[150] They cite the works of several celebrated prison wardens to show how the warden's perspective can skew his perception of the deterrent effect of the criminal law.[151] A warden of Sing Sing, for example, wrote that "the prison man knows this threat [the death penalty] is no deterrent for convicts have told him so again and again."[152] As Zimring and Hawkins explain, the fallacy of this inference is that the warden "has based his conclusion on experience with groups of men who have evidently *not* been deterred or they would not be in prison."[153] His experience provides scant information about how many others the threat of capital punishment has deterred. The warden has simply never met them. Whatever one's view of the death penalty, all sanctions for murder should not be repealed simply because some people have killed in spite of those sanctions. Similarly, the exclusionary rule should not be abolished merely because some police officers violate the fourth amendment in spite of it. If the rule cannot influence certain types of police behavior, the answer is to devise additional controls, not to abolish the one significant control that already exists.

Professor Amsterdam suggests that the exclusionary rule is analogous to police department anti-theft programs for branding personal property.[154] Identification marks diminish the value of property to a prospective thief because he knows that it will be more difficult to sell the goods at a worthwhile price.[155] Thus, such programs reduce the incentive to steal. Although thieves who steal only for excitement, for their own use, or for revenge, are not deterred by identification programs, police departments should not, for this reason alone, abandon these programs. The assertion that the exclusionary rule fails to deter a police officer whose conduct is motivated by other than the hope for successful prosecution is a similarly unconvincing argument for abandoning the exclusionary rule.

Oaks' second argument, that police values may conflict with constitutional values,[156] is more troublesome. This tension, however, would frustrate *any*

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[150] First, police officers have little fear of disciplinary action by the department. Second, the penalty for exclusionary rule falls not upon them, but upon the prosecutor. *Id.* at 725-26. Third, motivation to comply with the fourth amendment varies widely among different officers in particular situations. *Id.* at 729-33.

[151] F. ZIMRING & G. HAWKINS, *supra* note 138, at 30-32.

[152] *Id.* at 26-31 (citing C. DUFFY, 88 MEN AND 2 WOMEN (1962); L. LAWES, MEET THE MURDERER (1940); Kirchwey, *The Prison's Place in the Penal System*, 157 ANNALS OF AAPSS 13 (1931)).

[153] *Id.* at 31 (citing DUFFY, *supra* note 151, at 22).

[154] *Id.*

[155] Amsterdam, *supra* note 88, at 431.

[156] "On the other hand," as Amsterdam puts it, "a criminal court system functioning without an exclusionary rule . . . is the equivalent of a government purchasing agent paying premium prices for goods branded with the stamp of unconstitutionality." *Id.* at 431-32.

[157] Oaks, *supra* note 103, at 727-29.

remedy designed to conform police conduct to constitutional standards. Yet there is evidence that the problem is, at least in part, generational. Younger officers may be more willing to accept the legitimacy of constitutional restraints in solving crimes and apprehending offenders.[157]

Oaks' third criticism, that police officers do not understand fourth amendment standards because those standards are poorly-communicated and confusingly-articulated,[158] is likewise vexing. Nevertheless, this failure of communication is a difficulty that must be overcome if police are ever to comply with constitutional standards, whatever enforcement mechanism courts may employ.[159] Thus, the lack of understanding is a problem attendant to the fourth amendment itself, not to the exclusionary rule.[160] If poor communica-

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157. *See* S. WASBY, SMALL TOWN POLICE AND THE SUPREME COURT 105, 218 (1976) (study of police in rural communities indicated "generational effect" in reactions to exclusionary rule). *See also* Amici Curiae Brief for Americans for Effective Law Enforcement, Inc. at 17, California v. Krivda, 409 U.S. 33 (1972) (arguing that exclusionary sanction no longer constitutionally required because police professionalism in search and seizure area has eliminated bulk of fourth amendment violations).

158. Oaks, *supra* note 103, at 730-32.

159. The problem of unclear standards is likely overstated. In certain areas where the law remains unsettled—notably the "container" search cases—standards are confusing. Nevertheless, the basic standards for the great majority of searches and seizures are far more definite. The fundamental principle that the police may not conduct a search or seizure without probable cause is easy enough to understand, and the courts have perfromed generally well in giving the police guidance whether probable cause is present in recurring fact patterns. *See* notes 185-93 *infra* and accompanying text. Further, situations where the police may search or seize without probable cause are about as clearly defined as one could realistically hope. *See* note 118 *supra*.

Reading reported appellate cases yields skewed perceptions of the difficulties police encounter when trying to comply with the fourth amendment, because reported cases are likely to be the very ones where the propriety of police action is doubtful, but the action is not clearly wrong. The vast bulk of police searches and seizures are never recounted in the case reports. Moreover, in the area where confusion is presently greatest, the container search cases, the issue is whether the police may search without a warrant. Even if the bounds of the warrant requirement are hazy in those cases, the police can easily obtain the evidence they seek and comply with the fourth amendment by simply obtaining warrants in doubtful cases.

160. This is, for example, the argument in Dworkin, *supra* note 103. Dworkin, himself a supporter of the exclusionary rule, *id.* at 330-33, nonetheless asserts that "the law does not permit the rule to work as well as possible." *Id.* at 333. In his view, "[f]ourth amendment law is so uncertain, incomprehensible, quibble ridden, and ever changing that it deprives any sanction of a meaningful chance to control conduct." *Id.* at 333-34. The underlying disease generating these symptoms is, Dworkin believes, the "fact style decision making," *id.* at 334, by which the Court too often resolves fourth amendment issues. *Id.* at 334. Dworkin advocates regulating the police through inflexible enforcement of rules "expressed in language directed to the police and clear and precise enough for them to follow." *Id.* at 336. This solution, Dworkin argues, would obviate the need for determining the applicability of a rule on a case-by-case basis. *Id.* Dworkin's criticisms, whatever their merit, are not criticisms of the exclusionary rule.

At the end of its most recent term, the Supreme Court decided two fourth amendment cases that suggest that the Court may be moving toward a more rule-oriented conception of the amendment. In New York v. Belton, 101 S. Ct. 2860 (1981), the majority, in an opinion by Justice Stewart, announced the bright-line rule that when police lawfully arrest the occupant of a car, they may search the entire passenger compartment and any open or closed containers found within. *Id.* at 2864 & n.4. The opinion purported to be only an extension of Chimel v. California, 395 U.S. 752 (1969). 101 S. Ct. at 2864. Writing for the majority in *Chimel*, Justice Stewart had limited the scope of a search incident to a valid arrest to the area within the arrestee's immediate control, in which he could obtain a weapon or destroy evidence. 395 U.S. at 763. The Court in *Chimel*, however, had established only a general rule for application on a case-by-case basis.

In Robbins v. California, 101 S. Ct. 2841 (1981), decided the same day as *Belton*, Justice Stewart again endeavored to establish a hard and fast rule. *Id.* at 2847. In *Robbins*, the police seized two bricks of marijuana wrapped in opaque plastic in the luggage compartment during a valid automobile search. The court held the search invalid and the marijuana inadmissible. Police must obtain a warrant to search opaque containers found in the luggage compartment during a lawful search of a car. *Id.* In

tion is a reason to abolish the exclusionary rule, then it would similarly be a reason to abolish any device for enforcing the fourth amendment. Moreover, it would be craven for us to abolish the exclusionary rule on grounds of ineffectiveness when the police themselves hold the key to rendering it effective through better hiring practices, training, and continuing instruction.

Systemic Deterrence. Although Oaks' criticisms of the exclusionary rule as a deterrent can be individually countered, the major flaw underlying his entire argument is his reliance on the analogy between the deterrent effect of criminal law and the deterrent effect of the exclusionary rule. This analogy fails under close analysis, because the exclusionary rule operates through mechanisms that simply have no analog in the penal law. Unlike the criminal law, which seeks to control the behavior of the general public, the exclusionary rule attempts to influence the conduct of members of various law enforcement agencies. Although there are many such agencies, each is a structured governmental entity. It is likely that the threat of the exclusionary sanction will influence these various police units and through them, the individual officers. Consequently, even if a particular constable is indifferent to whether his arrests and seizures result in convictions, those who run the police department are concerned with successful prosecutions. Further, although individual officers might entertain hostility toward fourth amendment rights, police departments are not likely to share such a view, at least officially. Thus, at least the more professional police forces can be expected to encourage fourth amendment compliance through training and such guidelines as the department provides for conducting searches, seizures, and arrests.

Moreover, even if the standards that the fourth amendment sets are more elusive than the rules embodied in the general criminal law, police officers are in an excellent position to assimilate them. The fourth amendment, after all, permeates the officers' day-to-day professional life, and police departments surely possess the means to convey information to the officers in the field. Even if prosecutors cannot always find the time to explain the fourth amendment to the police, many of the larger police departments hire legal counsel to make legal standards intelligible to the policeman on patrol.[161]

An example of systemic deterrence is the administrative response to the Supreme Court's decision in *Delaware v. Prouse*.[162] In *Prouse*, the Court ruled that police may not stop a car on the open road for a license or registration check, in the absence of articulable suspicion to believe that criminal activity is afoot.[163] Before *Prouse*, the constitutionality of random traffic stops was un-

Justice Stewart wrote only for a plurality. Justice Powell concurred in the judgment but rejected the plurality's bright-line rule in favor of a test of whether a sufficient expectation of privacy in the items searched exists. 101 S. Ct. at 2847 & n.1 (Powell, J., concurring). Regardless of the wisdom of the opinions in *Belton* and *Robbins*, these cases demonstrate the Court's increased sensitivity to the need for more manageable standards. *But see* United States v. Ross, 655 F.2d 1159 (D.C. Cir.) (en banc) court of appeals held that police required to obtain warrant to search paper bag in automobile trunk. Supreme Court agreed to hear argument on question whether *Robbins v. California* should be reconsidered), *cert. granted*, 50 U.S.L.W. 3265 (U.S. Oct. 13, 1981) (No. 80-2209).

161. *See* notes 162-74 *infra* and accompanying text (discussing police department reactions to fourth amendment decisions).

162. 440 U.S. 648 (1979).

163. *Id.* at 663.

certain.[164] In the District of Columbia, for example, police had conducted such stops upon the strength of a 1972 decision of the District of Columbia Court of Appeals.[165] Nevertheless, when in 1979 the Supreme Court in *Prouse* announced that these stops violated the fourth amendment,[166] the D.C. Metropolitan Police reacted swiftly. The Chief of Police issued an immediate telex message to his officers, advising them to desist from the practice.[167] The Police Department is now incorporating the change in procedures in the Department's General Orders, a set of regulations issued to each officer and with which each officer must be familiar.[168]

Even before the ultimate Supreme Court decision in *Prouse*, the Delaware State Police had responded to the trial court's holding that random traffic stops were unconstitutional.[169] After the trial court's decision the State Attorney General's office conferred with a Legal Officer employed by the Delaware State Police.[170] Within two months of the court's decision, the Legal Officer had disseminated a memorandum to all troops and units within the State Police describing the decision, explaining the conduct it prohibited, and advising that it did not affect stops based on articulable suspicion.[171] The memorandum also provided several examples of facts that could provide sufficient articulable suspicion for a stop.[172] The Legal Liaison Office of the Delaware State Police has noted that "[a]ll court decisions affecting daily police operations are disseminated to patrol officers by similar Legal Memorandums."[173]

While this article has not undertaken to survey other police department responses to *Prouse*, or other court decisions changing or clarifying the scope of permissible police conduct,[174] it is apparent what police departments, or at least the larger of them, can do. It denigrates the professionalism of the police

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164. *See id.* at 651 & nn.2-3 (listing conflicting decisions on issue of random stops in state and federal courts of appeals).

165. Palmore v. United States, 290 A.2d 573, 583 (D.C. 1972), *aff'd on jurisdictional grounds*, 411 U.S. 389 (1973).

166. 440 U.S. at 663.

167. *See* Wash. Post, March 28, 1979, § A, at 1, col. 4 (discussing D.C. Police Chief Jefferson's prompt orders to officers to stop performing random traffic stops without articulable suspicion).

168. *See* M.P.D.C. Gen. Order 304-10 (1973). This general order, which deals with a broad range of police-citizen contacts, is currently being updated to take into account recent changes in the law. Telephone conversation between Silas Wasserstrom and Vernon Gill, General Counsel, Metropolitan Police Department (Nov. 12, 1981). The general order's provisions on traffic stops have already been rescinded by a special order. *Id.*

169. State v. Prouse, No. 176-12-0213 (Del. Super. Ct. Mar. 10, 1977) (per Walsh, J.) (unreported) (copy on file at *Georgetown Law Journal*), *aff'd*, 382 A.2d 1359 (Del. 1978), *aff'd*, 440 U.S. 648 (1979).

170. Memorandum from James E. Liguori, Deputy Attorney General of the State of Delaware to Lieutenant Thomas J. Roman (Mar. 31, 1977) (copy on file at *Georgetown Law Journal*).

171. Legal Memorandum, No. 2-77, from Lieutenant Thomas J. Roman, Legal Officer, Delaware State Police (May 2, 1977) (copy on file at *Georgetown Law Journal*).

172. *Id.*

173. Letter from Captain Thomas J. Roman to Scott Mendelloff (July 17, 1981) (copy on file at *Georgetown Law Journal*). Captain Roman kindly gave us this information in answer to our inquiry concerning the response of the Delaware police to *Prouse*, and he provided us with copies of the documents cited in notes 170-71 *supra*.

174. Another case in point that can be readily documented is the response to Almeida-Sanchez v. United States, 413 U.S. 266 (1973). After the Court's decision in that case, Border Patrol agents altered their practices to conform with it. United States v. Brignoni-Ponce, 422 U.S. 873, 880 n.6 (1975). In *Almeida-Sanchez*, the Court held that probable cause is necessary for random, full-car searches near the Mexican border. 413 U.S. at 273. *But see* United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (no suspicion required for police to stop and question occupants of car at reasonably located

to assume that they cannot or will not assimilate the standards that the courts set. It is reasonable to assume that a professional police department can obtain substantial compliance from its officers in the field, especially when, as in *Prouse*, a new decision announces a relatively clear-cut rule.[175]

The suppression of evidence in *Prouse*, therefore, was a small price to pay for an enormous benefit in protection from unlawful police activity. At the cost of one marijuana prosecution, the Delaware State Police, and, it can be expected, police everywhere who had previously conducted routine license and registration spot checks, have abandoned this practice. No doubt countless motorists have been, and will be, spared this violation of their constitutional rights. Thus, applying the measure of the deterrent effect of the exclusionary rule that the probable cause requirement suggests—that suppression of evidence in one case must prevent police misconduct in one or more instances—the exclusionary rule performs admirably. Applying the rule not only deters the specific officer who lost evidence from repeating his transgression, but the specter of the rule also deters officers who have not personally lost evidence. Even more dramatically, the rule prevents countless abridgements of fourth amendment rights through law enforcement's institutional response to changes in fourth amendment law.

C. PREVENTION OF VIOLATIONS THROUGH DEVELOPMENT OF FOURTH AMENDMENT LAW

As *Prouse* demonstrates, the exclusionary rule affects police department conduct and achieves at least systemic deterrence. An equally important, although less obvious, benefit of the rule is that it fuels the development of fourth amendment law. A glance through any criminal procedure case book

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border checkpoints); United States v. Brignoni-Ponce, 422 U.S. at 881-82 (articulable suspicion sufficient for Border Patrol agent to stop car near Mexican border and to conduct limited questioning).

Although similar examples of changes in institutional policy resulting from court decisions on the fourth amendment abound, the literature concerning empirical evidence on the effectiveness of the exclusionary rule largely ignores them. Assuming that field officers obey administrative directives concerning proper search and seizure procedures (and they surely do to some significant degree), cases such as *Prouse* and *Almeida-Sanchez* clearly demonstrate that suppression of evidence in one case can prevent subsequent fourth amendment violations. This is, manifestly, a form of deterrence.

175. Fourth amendment decisions result in changes in the behavior of law enforcement officials not only at state and local levels, but also at the federal level. In an address to the Harlan Fiske Stone Law Society at Amherst College, FBI Director William Webster described the FBI's present methods of apprising its agents of all Supreme Court and relevant court of appeals fourth amendment decisions. Webster, *Routine Methods Won't Stop the Leaders of Crime*, AMHERST, Summer 1981, at 27. Webster stated that "[w]ithin 24 hours after a major case comes down affecting our right to do anything, the people in the field are informed of the significance of that case, with more details to follow." *Id.* An example of this action was the FBI's response to decisions on the authority of the agency to enter premises surreptitiously to install a microphone. The United States Court of Appeals for the Sixth Circuit held that, although the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518 (1976), permitted the FBI to seek a court order to enter, it did not authorize a surreptitious break-in even with such an order. United States v. Finazzo, 583 F.2d 837, 841 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979). The FBI promptly informed its agents within the jurisdiction of the Sixth Circuit of the decision in *Finazzo*, and instructed them to stop conducting surreptitious entries. Webster, *supra*, at 27. The Supreme Court later decided that such entries were legal. *See* Dalia v. United States, 441 U.S. 238, 248, 254 (1979) (fourth amendment does not prohibit per se, and title III implicitly permits, courts to authorize covert entries to install electronic surveillance devices). The FBI again sent instructions to its agents. Although the Court held that the statute did not require a court order for surreptitious entry, the FBI still demanded that its agents seek court authorization. Webster, *supra*, at 27.

should persuade even the skeptic that virtually every case defining fourth amendment limits on police behavior arose only because a defendant objected to the use of certain evidence, forcing a court to decide whether the police had violated the defendant's constitutional rights when they obtained it.[176] Think, for example, of *Chimel v. California*,[177] *United States v. Katz*,[178] *Payton v. New York*,[179] and *Steagald v. United States*.[180] All of these cases involved objections to the use of evidence and all resulted in new limits on intrusive police conduct.[181] Thus, exclusionary rule litigation provides the principal occasion for the articulation of fourth amendment standards.[182] Without such litigation, it is likely that many of these fourth amendment issues would have remained unresolved.

The exclusionary rule not only prevents fourth amendment violations by eliciting path-breaking decisions by the Supreme Court, but also is indispensible to the development of law by the lower courts. Suppression litigation provides the principal occasion for appellate courts to clarify and refashion the broad principles of the fourth amendment; it also permits development of coherent standards through case-by-case adjudication of more fact-specific questions. This process is most evident in the cases that give content to the phrase "probable cause." Given both the myriad factual situations that the police encounter and the often unpredictable variations within even common pat-

176. *E.g.*, Y. KAMISAR, W. LA FAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE CASES, COMMENTS AND QUESTIONS (5th ed. 1980); S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE CASES AND COMMENTARY (1980); L. WEINREB, LEADING CONSTITUTIONAL CASES ON CRIMINAL JUSTICE (1981).

177. 395 U.S. 752 (1969).

178. 389 U.S. 347 (1967). It is important to recognize that exclusionary rule litigation not only provides the occasion for developing fourth amendment standards of reasonableness, but also the occasion for deciding what sorts of governmental intrusions and surveillance consitute a search or seizure, and are thus subject to constitutional restraints and judicial scrutiny. As technological advances result in ever more "frightening paraphanalia which the marvels of an electronic age . . . visit upon human society," Silverman v. United States, 365 U.S. 505, 509 (1961), what privacy we have is increasingly threatened. Continuing exclusionary rule litigation that defines a "search" thus becomes all the more essential to the protection of that privacy. As Professor Amsterdam puts it, "I can think of few constitutional issues more important than defining the reach of the fourth amendment--the extent to which it controls the array of activities of the police. . . . the amount of power that it permits its police to use without effective control by law." Amsterdam, *supra* note 88, at 377.

179. 445 U.S. 573 (1980).

180. 101 S. Ct. 1642 (1981).

181. Steagald v. United States, 101 S. Ct. at 1645 (defendant moved to suppress unlawfully-seized evidence); Payton v. New York, 445 U.S. at 577 (same); Chimel v. California, 395 U.S. at 754 (defendant objected to admission into evidence of unlawfully-seized property); United States v. Katz, 389 U.S. at 348 (defendant objected to use of unlawfully-intercepted phone conversations).

182. The case law abounds with examples of the developmental benefit of the exclusionary rule. In Chimel v. California, 395 U.S. 752 (1969), for example, the Court held that a warrantless search incident to a valid arrest may extend only to the area within the suspect's immediate control. *Id.* at 763. In so holding, the Court overruled United States v. Rabinowitz, 339 U.S. 56, 59, 64 (1950) (one hour search of defendant's office, including desk, safe, and files, justified as incident to valid arrest). 395 U.S. at 768. Similarly, the Court in United States v. Katz, 389 U.S. 347 (1967), held that the use of an electronic eavesdropping device attached to the outside of a phone booth constituted an unreasonable search under the fourth amendment. *Id.* at 354. The *Katz* Court refused to follow the holding of Olmstead v. United States, 277 U.S. 438 (1928), that the fourth amendment applies to eavesdropping only when an actual physical invasion has occurred. 389 U.S. at 353. Finally, it was only after the exclusionary rule was applied to the states in Mapp v. Ohio, 367 U.S. 643, 655 (1961), that the Court had occasion to address the issue of just how much of the fourth amendment applied to state officials through the fourteenth amendment. In Ker v. California, 374 U.S. 23, 33 (1963), the Court ruled that it applied in full.

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terns, reducing probable cause to a set formula is an impossible task.[183] Nevertheless, by deciding fourth amendment cases, courts are able to define probable cause more precisely. Thus, through this continual refinement, the police can become more certain of when probable cause exists and when it is lacking.

Fourth amendment case law in the District of Columbia provides one example of the developmental benefits of the exclusionary rule. When a police officer observes a suspected drug deal, he confronts a recurring dilemma. When he sees an interchange between people on a sidewalk, particularly in a high drug-use area of the city, he is justifiably suspicious. Yet he may not actually see any identifiable substance change hands. Moreover, the brief detention and interrogation that *Terry v. Ohio*[184] permits in these circumstances is unlikely to yield anything but denials. Unless the officer can act, however, the sale of drugs may continue with impunity. Thus, although the case law recognizes the significance of other factors such as the particular officer's expertise in recognizing narcotics transactions,[185] the suspect's reaction to an approaching officer,[186] and the reputation of the area as one in which narcotics are prevalent,[187] the District of Columbia Court of Appeals has developed a practical test. Generally, if the officer sees a suspect pass something in return for money under otherwise suspicious circumstances, he may arrest.[188] If he sees only a one-way transfer, however, he may not.[189]

Another recurring close question of probable cause arises when a police officer sees someone carrying property down the street, but has no knowledge of a particular theft to which the property can be linked. In this situation, the case law holds that the officer may not seize the property or arrest the person even if *Terry* questioning elicits evasive responses.[190] Appellate decisions do,

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183. The authors do not share Dworkin's dismay that the Supreme Court has been unable to condense all of probable cause into a few easily stated and applied rules. *See* Dworkin, *supra* note 103, at 329, 367. Probable cause issues arise in so many different settings and involve so many potential variations that any comprehensive set of rules would be too rigid to encompass all the relevant considerations.

184. 392 U.S. 1 (1968); *see* note 118 *supra* and accompanying text (discussing police conduct that is permissible on less than probable cause).

185. *See* Munn v. United States, 283 A.2d 28, 30 (D.C. 1971) (narcotics agent's experience with drug transactions relevant to finding of probable cause to arrest); *cf.* Bell v. United States, 254 F.2d 82, 85-86 (D.C. Cir.) (officer's experience relevant to finding probable cause to arrest), *cert. denied*, 358 U.S. 885 (1958).

186. *See* Tobias v. United States, 375 A.2d 491, 494 (D.C. 1977) (flight of suspect upon approach of officer relevant to assessment of probable cause).

187. *See* Peterkin v. United States, 281 A.2d 567, 568 & n.4 (D.C. 1971) (frequency of drug traffic in particular area may be relevant to assessment of probable cause), *cert. denied*, 406 U.S. 922 (1972).

188. *See id.* at 568-69 (transfer of substance in bottle in return for cash in high drug activity area provided probable cause to arrest).

189. *See* Vicks v. United States, 310 A.2d 247, 249 (D.C. 1973) (transfer of money without two-way exchange insufficient grounds for probable cause to arrest); Gray v. United States, 292 A.2d 153, 155-56 (D.C. 1972) (mere transfer of money not ground for probable cause).

The Metropolitan Police Department's General Counsel's Office transmits teletype messages for dissemination to all officers that summarize and analyze decisions such as these as soon as they are reprinted. *See* Teletype Message No. 31-428 (Oct. 26, 1981) (describing probable cause test established by District of Columbia Court of Appeals in Howell v. United States, 109 Daily Wash. L. Rep. 2049 (D.C. Aug. 4, 1981)) (copy on file at *Georgetown Law Journal*). The teletype message is read at roll call for the week after it is issued. *Id.*

190. *See* United States v. Pannell, 383 A.2d 1078, 1079-80 (D.C. 1978) (no probable cause to arrest or seize property even when *Terry* questioning of suspect carrying television on street heightens officer's

however, tell the police what additional information provides probable cause justifying a search or arrest. Courts have upheld arrests and seizures when the police saw the defendant appear to look for something to steal before he reappeared carrying the suspect property,[191] when the property bore distinctive markings of ownership obviously placed there by someone other than the suspect and the suspect ran when the officer approached,[192] and when the policeman offered a detailed description of the suspicious conduct he observed before arresting the suspect and the suspect obviously lied in answering the officer's questions.[193]

These appellate decisions provide valuable guidance to police concerning when they may or may not act. Although the opinions may fall short of providing fool-proof formulas, they do draw sensible lines that the police can be expected to understand and observe, if they are motivated to do so. Thus, these standards themselves prevent violations of fourth amendment rights, for they give the police a reasonably clear message of when, despite their suspicions, the law does not permit arrest. Such specific standards develop only through case-by-case adjudication of fourth amendment issues.

By functioning as the primary mechanism through which the courts develop and articulate the limits of the fourth amendment itself, the exclusionary rule plays an indispensible role in preventing fourth amendment violations.[194] Although this point appears obvious, critics and courts have generally overlooked this benefit of the rule when balancing its advantages against its costs.[195] Yet clarifying what the police may and may not do can result in enor-

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suspicions); Campbell v. United States, 273 A.2d 252, 253, 255 (D.C. 1971) (no probable cause to arrest if suspect carrying television and screwdriver, even when denies ownership of screwdriver during brief questioning); Dougherty v. United States, 272 A.2d 675, 676 (D.C. 1971) (no probable cause to copy serial and model numbers of television suspect carrying on street).

191. *See* Nixon v. United States, 402 A.2d 816, 818-19 (D.C. 1979) (probable cause to arrest when suspect looked intently into parked cars in high crime area, reappeared later carrying box concealed in newspaper, and replied suspiciously to brief questioning).

192. *See* Edwards v. United States, 379 A.2d 976, 977-78 (D.C. 1977) (probable cause to arrest when suspect carrying property in pillow case with mark of school in deserted area late at night and fled when officers approached and identified themselves).

193. *See* Wray v. United States, 315 A.2d 843, 845 (D.C. 1974) (probable cause to arrest when detailed report of suspicious conduct observed by officer and suspect obviously lied during *Terry* questioning).

194. The exclusionary rule contributes to the development of fourth amendment law not only in situations involving arrests and searches made without probable cause, but also in the context of warrants. If an officer knows that both the issuing magistrate and a trial judge at a suppression hearing might scrutinize his affidavit, he will likely be more careful in ascertaining and stating his grounds for probable cause before he acts. The exclusionary rule also discourages the magistrate-shopping that might occur if there were no possibility of examination of an affidavit in support of a warrant at a later hearing. Further, the magistrate is likely to take more care in determining the existence of probable cause if the possibility of later scrutiny exists. Finally, a challenge to the magistrate's finding of probable cause aids in the development of fourth amendment law, particularly as certain constitutional issues, such as requirements for informants, arise most commonly when the police act with warrants. Admittedly, the law that the Supreme Court has fashioned in this area is not as coherent as it might be. *See, e.g.*, United States v. Harris, 403 U.S. 573, 581 (1971) (plurality opinion) (affidavit in support of warrant sufficient when it relates unnamed informant's personal observations and prior events within affiant's own knowledge); Spinelli v. United States, 393 U.S. 410, 416 (1969) (affidavit in support of warrant must indicate underlying circumstances showing informant's reliability and either how informant gathered information or detail sufficient to indicate information more than mere rumor); Aguilar v. Texas, 378 U.S. 108, 120 (1964) (affidavit must indicate basis for believing informant reliable). *See generally* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.3.

195. Professor Oaks recognizes that "[i]t is . . . imperative to have a procedure by which courts can

mous benefits in protecting privacy.[196] Moreover, this process of judicial clarification can advance even when a court upholds police conduct. In *Dorman v. United States*,[197] for example, the United States Court of Appeals for the District of Columbia Circuit spelled out in detail the considerations that indicate the presence or absence of exigent circumstances sufficient to justify a warrantless entry of a house to make an arrest.[198] In this influential case,[199] the court defined exigent circumstances, although ultimately ruling that the evidence obtained was admissible.[200] Thus, important guidelines can emerge even when a

review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review . . . ." Oaks, *supra* note 103, at 756. Yet when Oaks listed the means by which the rule might prevent fourth amendment violations, he considered only its deterrent effect in a literal sense, rather than its more broadly conceived preventive value. *Id.* at 709-19.

Similarly, the Supreme Court overlooked the interest in fourth amendment law development when it denied habeas corpus relief to convicts who had a full and fair hearing on fourth amendment claims in state court. Stone v. Powell, 428 U.S. 465, 482 (1976). The Court reasoned that the possibility of collateral review of an alleged fourth amendment violation would have little or no deterrent effect. *Id.* at 493. Balancing this assumed miniscule or nonexistent incremental deterrence against the costs of allowing collateral application of the exclusionary rule, the Court denied habeas corpus review. *Id.* at 494. The Court, however, failed to consider whether collateral review of fourth amendment claims was justifiable because such review contributes to the development of fourth amendment law.

Cover and Aleinikoff argue that federal habeas corpus review permits a useful dialogue between federal and state courts, each of which brings a different perspective to criminal law issues. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036, 1050 (1977). Given the different nature of prosecutions in each, state and federal courts are likely to develop different perspectives on crime, law enforcement, and the fourth amendment generally. Thus, federal habeas corpus review of state prisoners' fourth amendment claims is probably necessary to allow state and federal courts to apply their own strengths to common problems. In considering whether to limit federal habeas corpus review, the Supreme Court should have addressed this point.

To the authors' knowledge, the Supreme Court has never discussed this process of law development through the exclusionary rule. Justice Brennan, however, alluded to it in his dissent in United States v. Peltier, 442 U.S. 531, 554 (1975) (Brennan, J., with Marshall, J., dissenting) (Court's refusal to apply Almeida-Sanchez v. United States, 413 U.S. 266 (1973), retroactively "could stop dead in its tracks judicial development of Fourth Amendment rights"). *See generally* Geller, *supra* note 70, at 654-56 (discussing opportunity for judicial review provided by exclusionary rule).

196. Certainly, a trial court's suppression of evidence often results in no written opinion and no appeal. Such cases, however, generally involve flagrantly unlawful police conduct. In such cases, an opinion is not necessary to tell the police what they have done wrong. Here the exclusionary sanction works more like a penal sanction. When a court applies the exclusionary rule to such flagrant misconduct, each individual instance of suppression functions primarily through special deterrence. At the same time, the constant suppression of such evidence serves as a general deterrent by removing from the police an incentive to violate the law. Moreover, when flagrant misconduct is involved, the normative principle underlying the rule—that the government should play no part in unlawful activity—is a compelling justification for the exclusionary sanction.

197. 435 F.2d 385 (D.C. Cir. 1970) (en banc).

198. *Id.* at 392-93. The court listed the following seven considerations: (1) whether the suspected offense is especially violent; (2) whether the police have a reasonable belief that the suspect is armed; (3) whether there are more grounds for probable cause than the minimum necessary to obtain a warrant; (4) whether the officers have a strong reason to believe the suspect is on the premises; (5) whether the suspect is likely to escape unless promptly apprehended; (6) whether the entry is peaceable; and (7) whether entry is during the day or night. *Id.*

Similarly, courts have developed limits for administrative searches while determining the admissibility of evidence in a criminal case. *See* Michigan v. Tyler, 436 U.S. 499, 510 (1978) (no warrant required to enter burning premises and remain for reasonable time to investigate, additional entries necessitate compliance with warrant requirements for administrative searches).

199. *See, e.g.*, United States v. Acevedo, 627 F.2d 68, 70 (7th Cir. 1980) (utilizing *Dorman* criteria for determining presence of exigent circumstances sufficient to justify warrantless entry); United States v. Kuleaar, 586 F.2d 1283, 1287 (8th Cir. 1978) (same); United States v. Campbell, 581 F.2d 22, 26 (2d Cir. 1978) (same).

200. 435 F.2d at 392-93.

court declines to suppress evidence.

Empirical studies that seek to rebut the efficacy of the rule as a deterrent often emphasize the substantial number of constitutional violations, as measured by successful motions to suppress, that occur despite the threat of the exclusionary sanction.[201] This measure, however, is fundamentally flawed. An increase in the number of successful motions to suppress is consistent with development of fourth amendment law. It may simply reflect an increased willingness of the defense bar to challenge doubtful, but longstanding, police practices like those in *Prouse*. Thus, more successful motions to suppress may be filed at the same time that the number of unreasonable searches or seizures decreases. Moreover, as courts tighten constitutional restraints on police, more constitutional violations will be recognized as such, even though police will generally heed new fourth amendment law. Just as no problem of black unemployment existed until slavery was abolished, so no fourth amendment violations existed until the courts gave meaning to the amendment in the course of litigation spawned by the exclusionary rule.[202]

D. THE ALTERNATIVE OF A TORT REMEDY

While an effective tort remedy would be a much needed supplement to the exclusionary rule,[203] such a remedy, even if it could be implemented,[204] would be an inadequate substitute.[205] This is because the exclusionary rule is essential to the development of fourth amendment law. Fourth amendment violations simply generate little litigation not related to suppression of evidence. *Delaware v. Prouse*[206] again provides a valuable example of this. Without the exclusionary rule, it is improbable that the Court would have determined that random traffic stops constitute unreasonable seizures within the fourth amend-

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201. *See* note 116 *supra* (studies of effectiveness of exclusionary rule).

202. So also does the measure of per capita income within a country go down as its infant mortality rate is reduced.

203. The exclusionary rule has the obvious drawback that it only provides a remedy for fourth amendment violations that result in the seizure of incriminating evidence. A tort remedy is therefore needed as a supplement to the exclusionary rule.

204. The possibility that legislatures will develop such a remedy is remote. As Professor Amsterdam has noted:

> Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police. Even if our growing crime rate and its attendant mounting hysteria should level off, there will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control.

Amsterdam, *supra* note 88, at 378-79.

205. Professor Dellinger has argued that the unqualified language of the fourth amendment—that "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated"—prohibits government from "buy[ing] itself out of having to comply with the constitutional commands" simply by paying to do so through tort damages. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972). This is a powerful argument in favor of the exclusionary rule when there has been a knowing and intentional violation of fourth amendment rights. When government agents have acted unconstitutionally but in good faith, however, the government is less clearly buying itself out of compliance with constitutional restraints when it pays tort damages. Nevertheless, as this article argues, in all other respects tort damages are peculiarly inappropriate, and the exclusionary rule peculiarly necessary, when good faith, close to the line, police misconduct is involved.

206. 440 U.S. 648 (1979).

ment. Despite this important developmental role, critics of the exclusionary rule have suggested the alternative of a tort remedy.[207] Yet providing the victim of an illegal search or seizure with redress in a separate civil action would not serve the purpose of developing fourth amendment law.[208]

A stop on the highway may be inconvenient, and even humiliating, and standardless stops can easily become capricious or discriminatory. But, once the stop is over, most people would continue on their way, because the per-

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207. One danger of unchecked police investigatory activity is the likelihood that searches and seizures will be conducted in an arbitrary and discriminatory manner. By requiring that police have reason to single out a particular individual or premesis before they arrest or search, the probable cause and warrant requirements abate this danger. Some commentators have persuasively argued that an additional mechanism for minimizing the dangers of arbitrary police conduct would be to require that intrusive police action be undertaken pursuant to comprehensive departmental regulations. *See* Amsterdam, *supra* note 88, at 417-23, 436-38 (suggesting such regulation as additional requirement of fourth amendment); Kaplan, *supra* note 131, at 1050 (suggesting that exclusionary rule not apply where "the police department in question has taken seriously its responsibility to adhere to the fourth amendment" by educating and regulating its officers). *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. (1967).

208. In his dissent in Wolf v. Colorado, 338 U.S. 25 (1949), Justice Murphy addressed the issue of alternatives to the exclusionary rule, discussing both criminal and civil actions against police officers who have violated a person's fourth amendment rights. *Id.* at 41 (Murphy, J., with Rutledge, J., dissenting). Justice Murphy emphasized some considerations that make a tort action an inadequate remedy: the difficulty of obtaining punitive damages, the variations in state rules limiting damages, the admissibility of the plaintiff's reputation, the common requirement of physical harm, the difficulties in collecting from often "judgment-proof" officers, and the possibility that the use of evidence seized in a criminal trial may be a defense in a tort suit. *Id.* at 43-44.

There are additional difficulties with a tort remedy not mentioned by Justice Murphy, including the fear of reprisal for suits against the police and the likelihood of jury prejudice in favor of officers. *See* Geller, *supra* note 70, at 692 (suggesting that fear of reprisals prevents civil suits against police); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1388-89 (1981) (claimant must run risk of reprisals from police and prosecutor; in addition, juries historically sympathize with police). *See also* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). On the other hand, there have been some significant changes in the law since Justice Murphy wrote, which enhance the possibility of recovering against governmental entities for the torts of their employees. In 1974, for example, the Federal Tort Claims Act (FTCA) was amended to permit actions against the federal government arising out of a federal officer's assault, battery, false imprisonment, abuse of process, or malicious prosecution. Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (amending 28 U.S.C. § 2680(h) (1970)). *See generally*, Note, *Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee*, 69 GEO. L.J. 803 (1981). In addition, many state statutes are available to persons seeking redress against state officers for constitutional violations. *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 450 n.13 (1978) (citing statutes); Schroeder, *supra*, at 1386-87. The Supreme Court has also opened paths for recovery against officers who violate the Constitution. In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Court held that a municipality may be liable under 42 U.S.C. § 1983 (1976 & Supp. III 1979) for the torts of its employees. 436 U.S. at 690. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court ruled that municipalities may not assert the good faith of their officers as a defense to a section 1983 claim. *Id.* at 650-51, 655-56.

Nevertheless, many obstacles block the plaintiff's path to recovery of tort damages. It has been held, for example, that under the FTCA an individual agent, as well as the government, may utilize a defense of "good faith and reasonable belief in the legality of . . . [the agent's] conduct." Norton v. United States, 581 F.2d 390, 397 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978); *cf.* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972) (valid defense in *Bivens* action against federal officer that agent acted in good faith with reasonable belief in validity of arrest and search), *on remand from* 403 U.S. 388 (1971). Furthermore, in order to recover against a municipality under section 1983, a plaintiff must demonstrate that the constitutional infringement was the result of governmental policy or custom, not merely the misdeed of an individual officer. Monell v. Department of Social Services, 436 U.S. at 694. Thus, even though there now exist potentially more effective tort remedies for egregious police misconduct, these remedies are inherently unsatisfactory alternatives to the exclusionary rule as a mechanism for developing fourth amendment law.

sonal inconvenience and intrusion are slight. Thus, damages in most tort actions would be only nominal. Therefore, although random traffic stops exact a high cumulative societal cost, and consequently demand fourth amendment protection, it is unlikely that a victim would have challenged the procedure in a tort action.[209] Many other privacy interests that demand fourth amendment protection fall in the same class.

Further, the probability of recovering damages in a tort action is minimal when, as in *Prouse*, the conduct of the police did not clearly violate a previously articulated legal standard. If a police officer's conduct is not manifestly unlawful, he could probably shield himself from tort liability by asserting some form of good faith defense.[210] Under *Pierson v. Ray*,[211] a good faith defense is available to state officers in federal civil actions brought under 42 U.S.C. § 1983;[212] such a defense is almost certainly available to federal officers in federal actions under the fourth amendment itself.[213] Thus, even if a tort remedy were effective when police conduct is flagrantly unlawful, that remedy would be useless to those challenging police conduct that had not previously been held unlawful.[214]

In such situations, a tort remedy would be not only unavailable but also undesirable. Critics of the exclusionary rule who would replace it with sanctions aimed directly at the offending officer often miss the point that if such sanctions were viable, they would deal a far more crippling blow to law enforcement than does the mere exclusion of illegally-seized evidence.

Under the probable cause standard police should operate close to the limits of behavior permitted by the fourth amendment. When probable cause is absent, police may not, and should not, arrest or search. When probable cause exists, however, they not only may act,[215] but generally should search or ar-

209. A contingent-fee lawyer would be unlikely to represent a client whose constitutional rights had been violated in such a situation because of the unpredictability of damages. Moreover, it is doubtful that the same client would be willing to assume possibly high legal fees in order to bring an action.

210. A good faith defense does exist in civil actions against officials pursuant to 42 U.S.C. § 1983 (1976). By examining the application of this defense, one author attempted to predict the effects of a good faith exception to the exclusionary rule in criminal proceedings. Hoopes, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 916 (1978). Hoopes concluded that a good faith exception could adequately protect a defendant's fourth amendment rights if problems of burdens of proof and the standard for determining what actions are indeed in good faith were resolved. *Id.* at 951. Hoopes suggested, however, that application of the civil good faith defense results in an emphasis on the officer's interpretation of the facts and that a similar result in a criminal proceeding would be "inconsistent" with the overriding policy of the fourth amendment that the determination of the propriety of a search and seizure is ideally removed from the discretion of the officer." *Id.*

211. 386 U.S. 547 (1967).

212. *Id.* at 557; *see* note 210 *supra*.

213. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that although Congress had provided no tort remedy for a violation of the fourth amendment, such a violation gave rise to a cause of action for money damages. *Id.* at 397. On remand, the United States Court of Appeals for the Second Circuit held that proof of good faith was a defense to such an action. 456 F.2d 1339, 1348 (2d Cir. 1972).

214. This would also be true when a suit is brought against a governmental entity. *See* note 208 *supra*.

215. Occasionally an arrest or search on probable cause is nevertheless held to be unreasonable. For example, in Filer v. Smith, 96 Mich. 347, 55 N.W. 999 (1893), the Supreme Court of Michigan allowed a claim for false arrest, stating that the police had a duty to collect additional facts when further investigation could quickly and easily increase or dispel probable cause. *Id.* at 354-55, 55 N.W. at 1002; *see* 1

rest.[216] Under the threat of sanctions imposed directly on the individual officer, however, officers may forbear from acting, even when they think they have the right, for fear that those who review their actions will disagree. This additional deterrence at the margin is an unnecessary social cost.

Thus, not only is civil litigation for damages often impractical, it is also an undesirable device for articulating and clarifying fourth amendment rights. If civil litigation were a victim's only recourse, the spot check issue in *Prouse*, for example, would almost certainly remain unresolved. Because William Prouse challenged this practice, albeit for the selfish motive of avoiding a conviction for drug possession, society has benefitted; the decision in *Prouse* has likely averted countless invasions of constitutional rights on our highways.[217] In contrast to civil remedies, the exclusionary rule exacts a peculiarly appropriate price for conduct that exceeds constitutional limits: it deprives the government of the precise evidence that would have been unavailable had its agents respected those limits.[218] Further, it provides police departments with an in-

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LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 3.2(d), at 467-68 (discussing *Filer v. Smith*). More recent fourth amendment decisions seem to have ignored this holding.

There are a few other scattered decisions ruling certain kinds of searches unreasonable despite probable cause to conduct them. One court, for example, has ruled that surgery to remove evidence of a crime is illegal unless consent is obtained. Adams v. State, 260 Ind. 663, 668, 299 N.E.2d 834, 838 (1973), *cert. denied*, 415 U.S. 935 (1974). Other courts balance the competing interests to determine if surgery may be compelled. *See* United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976) (en banc) (surgery to remove bullet allowed when no danger to defendant), *cert. denied*, 429 U.S. 1062 (1977); Allison v. State, 129 Ga. App. 364, 365, 199 S.E.2d 587, 588-89 (1973), *cert. denied*, 414 U.S. 1145 (1974). *See also* Schmerber v. California, 384 U.S. 757, 770 (1966) (removal of blood allowed while defendant unconscious because delay would allow destruction of evidence). Occasionally, state courts have ruled unconstitutional particularly intrusive searches of homes in pursuit of evidence of minor crimes. *See* McMahon's Administrator v. Druffan, 242 Ky. 785, 787-79, 47 S.W.2d 716, 718-19 (1932) (forcible, malicious search unreasonable); Buckley v. Beaulieu, 105 Me. 56, 60-61, 71 A. 70, 72 (1908) (destruction of interior walls during search of home unreasonable).

216. When one is required, and there are no exigent circumstances, a warrant must be secured before acting.

217. *See* notes 166-72 *supra* and accompanying text (discussing police reactions to *Prouse*).

218. Viewing the exclusionary rule from a different perspective, critics of the rule have pointed out that the sanction is peculiarly inappropriate, for it is geared neither to the gravity of the police misconduct nor to the seriousness of the crime with which the defendant is charged. This has led some commentators to suggest that the rule should apply only to "substantial violations." *See* MODEL CODE OF PRE ARRAIGNMENT PROCEDURE § 290.2(4) (Proposed Official Draft, 1975); TASK FORCE REPORT, *supra* note 31, at 55 (any remedy for violation of constitutional right should be proportional to magnitude of violation). Similarly, others have suggested that it be limited to "less serious" crimes. *See* Kaplan, *supra* note 131, at 1046 (discussing modification to rule that would preclude its application in most serious cases—treason, espionage, murder, armed robbery, and kidnapping). *But see* Allen, *supra* note 64, at 36 (disproportion exists between misbehavior and remedy; nevertheless, limitation to less serious crimes gives police license to proceed in some areas without legal restraint). Justice Rehnquist based his proposal that even if the exclusionary rule is to be retained in the federal courts it should not apply to the states on the fact that state crimes tend to be the most serious ones. California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay). Still others have suggested that in deciding the fourth amendment issue the seriousness of the suspected crime should be weighed in the balance. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 63.

It is also true that application of the exclusionary rule does not always put the government in precisely the position it would have been if its agent had stayed within constitutional bounds, for sometimes the police could have developed probable cause had they pursued their investigation lawfully. Nevertheless, when further avenues of investigation are open to the police, the exclusionary rule simply encourages the police to pursue them. In such cases, its costs to law enforcement should be minimal. When an investigation can only be pursued by trampling on constitutional rights, the exclusionary rule merely imposes on law enforcement the costs that the Constitution itself imposes.

centive to teach officers those limits, and to demand conformity to them. At the same time, the threat of the exclusionary sanction will not deter the individual policeman from acting when he thinks his actions are lawful.

E. SUMMARY

In light of recent Supreme Court decisions, the exclusionary rule is now premised on deterrence of police misconduct. Both courts and critics, however, have focused little attention on the precise quantum of deterrence necessary to justify the continued existence of the rule. The probable cause standard of the fourth amendment offers an appropriate measure of how effectively the exclusionary rule need deter to justify its continued existence as a purely prophylactic measure.

The exclusionary rule operates as a special deterrent, and as a general deterrent. The rule also operates in a more complex way to deter fourth amendment violations. Its very existence forcefully conveys to the police the importance that society attaches to the constitutional constraints that govern their actions. The threat that it will be applied when constitutional violations occur induces police departments to instruct their officers in fourth amendment law, and to train them to abide by that law. At the same time, exclusionary rule litigation provides the primary opportunity for the courts to announce what the fourth amendment requires, and to develop guidelines for the police to meet those requirements. A court's statement of what is lawful and what is unlawful conduct carries its own moral force,[219] and is backed by the threat of the exclusionary sanction. Police department responses to *Delaware v. Prouse* demonstrate both the success of the exclusionary rule as a systemic deterrent and the contribution of the rule to the development of fourth amendment law.

Finally, the exclusionary rule not only effectively deters police misconduct but also provides the best device for enforcing the fourth amendment. Exclusive reliance on the alternative of a tort remedy would derail the development of fourth amendment law. If it succeeded as a deterrent to illegal police practices, it would also deter legal police conduct that is close to the line of illegality to a far greater extent than does the exclusionary rule. Thus, as measured against the standards of the fourth amendment itself, the exclusionary rule remains an essential mechanism for deterring illegal police conduct. As this article will argue, a good faith exception would subvert this important function.

IV. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE: AN EXAMINATION OF *UNITED STATES V. WILLIAMS*

As our review of the exclusionary rule's evolution has indicated, the dominant rationale for the application of the rule is now deterrence of illegal police conduct. Nevertheless, judges and commentators continue to quarrel over whether the exclusionary rule does in fact deter, and whether this deterrence justifies the consequent costs of excluded evidence and freed criminals.[220]

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219. *See generally* F. ZIMRING & G. HAWKINS, *supra* note 138 (moral force of law as deterrent to its violation).

220. *See generally* note 103 *supra* (citing commentary on deterrent effect of exclusionary rule).

Recently, the exclusionary rule has come under attack as providing a remedy that is often excessive in proportion to the magnitude of the fourth amendment violation.[221] In its August, 1981 report, the Attorney General's Task Force on Violent Crime found that "[t]he fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law . . .—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial."[222] Because "the rule necessarily fails in its deterrent purpose" when applied to the "good faith" efforts of police officers to comply with the law, the Task Force recommended that the Attorney General support a good faith exception.[223]

In support of its recommendation, the Task Force cited only the deterrence rationale expressed in *Mapp* and the Fifth Circuit's en banc decision in *United States v. Williams*.[224] Moreover, the Task Force did not qualify its recommendation in any way to indicate possible shortcomings of the good faith exception, either conceptually or as the Fifth Circuit applied it. Because a good faith exception may very well negate the most important advantages of the exclusionary rule, these weaknesses must be recognized and addressed. Using the *Williams* decision as an example of the good faith exception in theory and in practice, this section questions the exception's underlying premise, criticizes both its substantive content and its procedural application, and doubts the *Williams* court's precedential support for its adoption. After discussing the exception at length in the *Williams* context, the section focuses on the jurisprudential problems that are inherent in a good faith exception both theoretically and as the *Williams* court formulated it.

A. THE DECISION IN *WILLIAMS*

In June, 1976, Special Agent Paul Markonni of the Drug Enforcement Administration (DEA) arrested Jo Ann Williams in Toledo, Ohio, for possession of heroin in violation of the Controlled Substances Act.[225] In March of the following year, after the district court denied her motion to suppress the her-

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221. *See generally* Posner, *supra* note 44, at 7; TASK FORCE REPORT, *supra* note 31, at 55-56.

222. TASK FORCE REPORT, *supra* note 31, at 55. If this passage implies that the courts have become increasingly expansive in their application of the exclusionary rule, in comparison with years past, it is plainly misleading. *Compare* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Court held invalid grand jury subpoenas based on illegally-seized evidence) *and* note 53 *supra* (discussing broad reach of exclusionary rule in early cases) *with* United States v. Calandra, 414 U.S. 338, 354 (1974) (Court upheld grand jury questions based on evidence obtained from unlawful search and seizure).

223. *Id.* at 55-56.

224. *Id.* at 55 (citing Mapp v. Ohio, 367 U.S. 643, 656 (1961); United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981)).

225. United States v. Williams, 622 F.2d 830, 833 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

21 U.S.C. § 841(a)(1) (1976), the provision Williams allegedly violated, provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

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oin, Williams pleaded guilty and was sentenced to three years imprisonment.[226] Subsequently, she appealed the denial of her suppression motion[227] and was released on bond pending appeal.[228] As a condition of her release, the court imposed travel restrictions that required Williams to remain in Ohio.[229]

In September, 1977, Agent Markonni, while on temporary assignment at Atlanta International Airport, recognized Williams as she disembarked from a nonstop flight from Los Angeles.[230] Markonni was aware of the travel restrictions on Williams' appeal bond.[231] He also knew that her Ohio conviction was based on heroin that she had obtained in Los Angeles.[232] Acting on the basis of this information, he approached her, identified himself, and asked her for identification and her airline ticket.[233] The ticket showed that Williams was bound for Lexington, Kentucky.[234] When Markonni asked her if she had permission to travel outside Ohio, Williams responded, "No, this is the first time."[235] When Markonni asked her why she was going to Lexington, she replied that she now lived there.[236] Markonni then arrested her for violating the travel restriction on her appeal bond and ordered other agents to search her incident to the arrest.[237] The search uncovered a packet of heroin in her coat pocket.[238] Markonni then arrested Williams again—this time for violating the Controlled Substances Act, the same offense he had arrested her for fifteen months earlier in Toledo.[239]

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226. 622 F.2d at 833.
227. *Id.*
228. *Id.* Such release is authorized by 18 U.S.C. § 3148 (1976), which provides in part:

> A person . . . (2) who has been convicted of an offense and . . . has filed an appeal . . . shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

Id.
229. 622 F.2d at 833. The impositon of travel restrictions as a condition of release pending appeal is authorized by 18 U.S.C. § 3146(a)(2) (1976), which provides:

> (a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:
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> . . . .
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> (2) place restrictions on the travel, association, or place of abode of the person during the period of release . . . .

Id.
230. 622 F.2d at 834.
231. *Id.*
232. *Id.* at 834 n.8.
233. *Id.* at 834.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* The next day, Markonni obtained a search warrant for Williams' luggage based both on the

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246. 594 F.2d at 90.

In November, 1977, Williams was indicted.[240] At a pretrial hearing, she argued that Markonni had no authority to arrest her for violating bond restrictions,[241] and moved to suppress all evidence of the heroin.[242] The district court agreed and suppressed the evidence;[243] the government appealed.[244]

On appeal before a panel of the United States Court of Appeals for the Fifth Circuit, the government contended that Agent Markonni's arrest of Williams was lawful on two theories.[245] First, it argued that Markonni had probable cause to arrest Williams for bail jumping.[246] The panel rejected this argument, holding that bail jumping must involve a willful failure to appear in court, and that Markonni had no reason to believe that Williams had missed a court ap-

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heroin found in her coat and Markonni's past experience with her. *Id.* at 834-35. The ensuing search of her luggage revealed more heroin. *Id.* at 835.

240. The indictment contained two counts: one based on the heroin found on her person; the other based on the heroin found in her luggage. *Id.*

241. *Id.*

242. *Id.* She also contended that the heroin recovered from her luggage was inadmissible as the fruit of the initial unlawful search of her coat. *Id.*

243. *Id.*

244. United States v. Williams, 594 F.2d 86, 97-98 (5th Cir. 1979), *rev'd*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

245. 594 F.2d at 90. A discussion of the considerations relevant to the determination of the initial question before the *Williams* court is necessary to an understanding of the court's good faith inquiry. The validity of Williams' arrest turns on the interplay of three statutes: 21 U.S.C. § 878(3) (1976), which defines the authority of DEA agents to arrest without a warrant; the Bail Reform Act, 18 U.S.C. §§ 3141-3152 (1976), which establishes the framework for release on bail; and 18 U.S.C. § 401(3) (1976), which defines the power of a court to punish for contempt.

Under 21 U.S.C. § 878(3), Markonni could lawfully arrest Williams if she was committing an offense against the United States in his presence or if he had probable cause to believe she had committed or was committing a felony. Here, it was undisputed that Williams was violating a condition of her release on bond when she traveled outside Ohio without the court's permission, and that Markonni knew with certainty about the travel restrictions. The issue, therefore, was whether Williams' conduct constituted either an offense against the United States or a felony. Neither the Bail Reform Act nor 18 U.S.C. § 401(3), however, provide a ready answer to this question. Although 18 U.S.C. § 3146 explicitly gives the court power to impose conditions of release, including travel restrictions, it does not expressly establish criminal sanctions for violations of imposed conditions. The only express criminal penalty set out in the statute is for "bail jumping," an offense defined as the willful failure to appear in court as ordered. 18 U.S.C. § 3150 (1976). Williams, however, had not missed any court appearances, and Markonni had no reason to believe that she had. Nevertheless, Williams was susceptible to arrest. Under 18 U.S.C. § 3146(2), the judge who imposed the travel restriction is authorized to issue an arrest warrant upon violation of this condition. In this case, however, no such warrant was issued.

Another possible ground for arrest was that, by violating her travel restrictions, Williams was subject to the penalties of criminal contempt because the Bail Reform Act does not interfere with the court's power to punish for contempt. 18 U.S.C. § 3151 (1976). Whether Williams' violation of her travel restrictions necessarily constituted contempt under 18 U.S.C. § 401(3), however, is an open question. A literal reading of section 401(3) suggests that disobedience of a court order constitutes contempt, punishable by fine or imprisonment. *See* United States v. Williams, 622 F.2d at 836. It is arguable, however, that a court may use its discretion when dealing with a violation of a bond condition and should declare contempt of court only in extreme cases. *See* United States v. Williams, 594 F.2d at 93. Moreover, even if the violation constituted contempt, it is uncertain whether an arrest may be made without the court's first issuing a warrant. Because contempt is a violation against the court, the reasoning would go, only a court should be authorized to initiate the process leading to possible sanctions. If the court determines that it is appropriate to issue a warrant, a DEA agent would then be authorized to arrest. *See* 594 F.2d at 92-93 (courts, not DEA agents, are vested with power to punish bond violations; DEA agents have no implied arrest power under § 401(3)). In sum, determining the lawfulness of Markonni's arrest involves difficult questions of the scope of the Bail Reform Act and 18 U.S.C. § 401(3). Only if Williams' conduct can be interpreted as a criminal violation of the Bail Reform Act or criminal contempt under 18 U.S.C. § 401(3), and thus, be considered an offense against the United States or a felony under 21 U.S.C. § 878(3), can Markonni's arrest of Williams be lawful.

246. 594 F.2d at 90.

pearance.[247] Second, the government argued that although Markonni may have characterized his action as an arrest for bail jumping, it was grounded on his knowledge that Williams was violating a condition of her release and thus should be construed as an arrest for that violation, which the government maintained constituted a criminal offense.[248] The panel rejected this contention as well, holding that a violation of a bond condition "is not a criminal offense . . . but merely sets the judicial machinery in motion and empowers a court, not a DEA agent, to determine whether punitive action is warranted."[249] The panel concluded that although Markonni "had reason to believe defendant Williams was violating the conditions of her bond, he did not have probable cause to believe a *criminal offense* had been or was being committed . . . ."[250] The panel, therefore, affirmed the district court's order suppressing the heroin.[251]

Dissenting from the panel's decision, Judge Charles Clark argued that the exclusionary rule should not bar the fruits of Williams' arrest. He based his reasoning on two premises:

> The purpose of the exclusionary rule is to take away any temptation of law enforcement officials to knowingly violate the rights of citizens by denying to the public proof of criminal conduct disclosed by such wrongful police activity . . . . In order for the exclusionary rule to serve its deterrent purpose, the officer must act in a way he either knew or should have known was wrongful.[252]

Thus, in Judge Clark's view, Markonni did only what "any reasonable, practical officer would have considered the law required him to do,"[253] and therefore, suppression of the evidence would not have the appropriate deterrent effect.[254]

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247. *Id.* at 91-92.

248. *Id.* at 94.

249. The court held that a violation of a bond condition is not a criminal offense under section 3146(c). *Id.* at 93.

250. *Id.* at 95.

251. *Id.* The panel also suppressed the heroin seized pursuant to the warrant from Williams' suitcase as fruit of the illegal arrest. *Id.* at 95-96.

252. *Id.* at 97 (Clark J., dissenting).

253. *Id.*

254. *Id.* Although Judge Clark disagreed with the majority's holding that the evidence should have been suppressed, he did agree that Williams' arrest was "legally wrong." *Id.* In fact, Judge Clark suggested that Markonni might be civilly liable for his actions. "If this were a suit for false arrest," he wrote, "I would have no difficulty in concurring in the majority's impeccable reasoning." *Id.* Like other opponents of the exclusionary rule who have sought to make its elimination more palatable by suggesting that an effective tort remedy should replace it, Clark never explained why he would impose tort liability for a good faith fourth amendment violation when he would not apply the exclusionary rule to the fruits of the same violation. If, as Clark contended, Markonni did only what a reasonable, practical police officer would do, it would be unfair to hold him civilly liable.

In addition to this equitable and logical inconsistency, imposing civil liability makes little sense from a practical standpoint. It would have a much greater negative effect on police activity than applying the exclusionary rule. *See* notes 203-19 *supra* and accompanying text (discussing alternative tort remedy). If, as Judge Clark argues, suppressing evidence "may have the deleterious effect of making the officer 'on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal,'" 594 F.2d at 97-98, the prospect of personal liability from a tort action would have an even greater inhibitive effect on police officers and consequently exacerbate the problem Judge Clark perceives. *See* text accompanying notes 215-16 *supra* (discussing inhibitive effect of tort liability).

The Fifth Circuit, on its own motion, granted rehearing en banc.[255] Although the government had argued before the panel only that the arrest and search were lawful, it filed a supplemental brief urging the en banc court to adopt an exception to the exclusionary rule along the lines suggested in Judge Clark's dissent.[256] In an extraordinary disposition of the case, the en banc court simultaneously issued two separate opinions, each of which "command[ed] a majority of the court," and reversed the decision of the district court for "reasons assigned in these alternate resolutions."[257] Two special concurrences were filed, but none of the judges dissented; all twenty-four judges joined one of the two majority opinions, and five judges joined both.[258]

The first en banc majority opinion dealt solely with the lawfulness of Agent Markonni's conduct. In this opinion, the court reversed the district court and held: first, that a violation of a condition of release is criminal contempt; and second, that because criminal contempt is an offense against the United States, Markonni had authority to arrest Williams for that offense when she committed it in his presence.[259] On the basis of this reasoning, a sixteen-judge majority concluded that the heroin should not have been suppressed because Agent Markonni did not violate the fourth amendment.[260]

The thirteen-judge second majority[261] considered the determination of the arrest's validity unnecessary to the suppression question: "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though

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255. 594 F.2d 98 (5th Cir. 1979).

256. *See* Supplemental Brief for Appellant on Rehearing En Banc 5-6, United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

257. 622 F.2d at 833.

258. *Id.* at 833, 840, 847, 848. Two judges who joined in the second majority opinion concurred specially to explain that the approach of that opinion was correct because it disposed of the case without addressing the constitutional question. *Id.* at 847-48 (Hill, J., with Fay, J., concurring specially). They stressed that it was proper to decide whether the fruits of the arrest were admissible under the good faith exception to the exclusionary rule, and thus avoid the constitutional issue whether the search was valid. *Id.* at 847.

Ten of the eleven judges who joined the first, but not the second, majority opinion also concurred specially. *Id.* at 848 (Rubin, J., with Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate & Thomas A. Clark, JJ., concurring specially). Noting that none of the twenty-four judges expressed any doubt that Williams' arrest was lawful, these judges contended that no alternative ground for a decision was necessary, and therefore judicial self-restraint was required. *Id.* They expressed regret that the case had been "utilized as a vehicle to disseminate a doctrine unnecessary to decision." *Id.* at 851. The concurrence also questioned the second majority's premise that deterrence is the exclusive purpose behind the exclusionary rule. *Id.* at 849-50. Although the judges who joined the second special concurrence took issue with both the propriety of the second majority opinion and its premise concerning the purpose of the exclusionary rule, they did not address the "merit or lack thereof" of the good faith exception. *Id.* at 851. The concurrence did state, however, that the announcement of the good faith exception created "a host of interpretive problems" that warrant debate. *Id.* at 850 n.4.

Judge Henderson was the only judge who joined the first majority opinion, but who did not also join either the second majority or the special concurrence.

259. *Id.* at 836-39 (first majority opinion). The first majority reasoned that Williams' willful breach of her bond restriction constituted contempt under 18 U.S.C. § 401(3). 622 F.2d at 836. Although Markonni was not authorized to punish this violation pursuant to section 401(3), which only empowers courts to act, the first majority held that Markonni could arrest Williams under 21 U.S.C. § 878(3) for her conduct, which it deemed to have been an offense against the United States. 622 F.2d at 839.

260. *Id.*

261. Subsequent references to *Williams* or the *Williams* court in this article are to this second majority opinion and the thirteen judges who supported it.

mistaken, belief that they are authorized."[262] Thus, in adopting this good faith exception to the exclusionary rule, the second majority also concluded that the heroin should not have been suppressed, but for a different reason. The second majority decided that although Agent Markonni may have violated Williams' fourth amendment rights, he acted reasonably and in good faith. Thus, despite any government illegality, the court concluded that the evidence should be admitted at trial against Williams.

The *Williams* opinion reflects the shortcomings of both the good faith exception itself and the Fifth Circuit's attempt to apply it. This article next examines these two problems, beginning with the flaws in the *Williams* court's application of the exception. These flaws stem primarily from the court's failure to apply its own test properly, but they are symptomatic of the difficulties that are inherent in the good faith exception to the exclusionary rule formulated by the *Williams* court.

B. THE COURT'S APPLICATION OF THE EXCEPTION

The initial problem with *Williams* is that the first majority's determination that Agent Markonni's arrest of Williams was lawful renders the alternate resolution by the second majority superfluous.[263] The difficulty here is not simply that either decision can be seen as dictum.[264] Rather, because the first opinion held that the arrest was lawful, the good faith, reasonable "misconduct" upon which the second majority based its holding never in fact occurred. With the precise nature of the "misconduct" undefined, it is impossible to determine whether a fourth amendment violation actually occurred, or even whether the mistake was reasonable and made in good faith.

The problem with such a notion is clear from the good faith approach itself: when a criminal defendant challenges police conduct by a motion to suppress, the court's application of the exclusionary rule must turn on whether the officer acted reasonably and in the good faith belief his actions were lawful. Thus, the good faith inquiry is dispositive of the suppression decision. A court applying this approach need *only* inquire into the reasonableness and good faith of the officer's action; like the *Williams* court, it need not determine conclusively whether these actions violated the defendant's fourth amendment rights.

The second difficulty with the *Williams* court's application of the good faith

262. *Id.* at 840 (second majority opinion).

263. This view was expressed in Judge Rubin's special concurrence and was supported by 10 of the Fifth Circuit's 24 then active circuit judges. 622 F.2d at 848 (Rubin, J., with Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate & Thomas A. Clark, JJ., concurring specially). A divergent view, however was taken by Judge Hill, who argued in a separate special concurrence that the second majority's approach was sensible because it allowed the court to address the admissibility of evidence without considering constitutional questions. *Id.* at 847 (Hill, J., with Fay, J., concurring specially). Now that the Fifth Circuit has been divided into two separate courts, the Fifth and Eleventh Circuits, the status of *Williams* may be uncertain.

264. In United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980), a three-judge panel of the Fifth Circuit described the second majority opinion in *Williams* as "dicta on limited good faith exception to [the] exclusionary rule." *Id.* at 420. The *Fitzharris* court was discussing possible justifications for a warrantless search of defendants' ranch, and mentioned *Williams* in a "*See also*" citation with the above parenthetical description. The *Fitzharris* opinion was written by Judge Henderson, who concurred in the first *Williams* majority opinion. The other panel members were Judge Rubin, who concurred in the first *Williams* opinion and also wrote the special concurrence attacking the second majority opinion, and Judge Reavley, who concurred in the second *Williams* majority opinion.

exception is related to the first. Because "[n]either Markonni's good faith nor [the arrest's] reasonableness" was challenged,[265] the *Williams* court did not conduct an analysis of Markonni's conduct. Obviously, the first majority's opinion made a remand for findings on Markonni's good faith and reasonableness unnecessary.[266] Nevertheless, the rationale of the good faith exception to the exclusionary rule requires that the second majority have made such findings. The Fifth Circuit's failure to consider Markonni's good faith and reasonableness deprived Williams of any opportunity to challenge his conduct. Williams, of course, had no reason to question Markonni's good faith or reasonableness because under then-existing law her burden was only to convince the court that Markonni had violated her constitutional rights.

Because the court never examined Markonni's actions one can only imagine what type of analysis the good faith exception mandates, or what kind of evidence Williams' defense counsel would have offered to challenge the application of the exception in this case. The good faith analysis is not difficult to hypothesize. The terms "reasonableness" and "good faith" suggest relatively straightforward standards: the former connotes an objective test; the latter, a subjective standard.[267] Nevertheless, an objective and subjective analysis of Markonni's actions in this case, when viewed in light of the evidence Williams' counsel could have introduced, points to the conclusion that his "misconduct" would not fall within a good faith exception.

Although the court failed to define clearly the nature of Markonni's misconduct, it did hint that his mistake was in believing that Williams' violation of her travel restriction constituted an offense against the United States.[268] If this had been Markonni's mistake, it would certainly have been an understandable one. As the *Williams* court pointed out, no court before the panel decision had confronted the question whether such a violation is an offense against the United States.[269] Thus, because of this uncertainty of the state of the law and because Markonni had authority to arrest for an offense against the United States,[270] his actions would have fallen within the scope of the good faith exception.

The record, however, which the *Williams* court conveniently ignored, indicates that Markonni's actual mistake had nothing to do with whether a bond violation constitutes an offense against the United States. Markonni's testimony at the suppression hearing demonstrates that the mistake he actually made was in thinking that Williams, by violating a condition of her release, had committed the felony of bail jumping, an infraction punishable under 18 U.S.C. § 3150.[271] The testimony is revealing:

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265. 622 F.2d at 847 (second majority opinion).

266. The first majority found that "the arrest . . . was legal, the search . . . proper and the heroin . . . was lawfully seized." *Id.* at 839 (first majority opinion). Because this opinion held the conduct lawful, there would be nothing to decide on remand.

267. This is not to say, however, that the tests will be easy to administer. *See* text accompanying notes 474-86 *infra* (discussing problems in administering *Williams* good faith exception).

268. 622 F.2d at 846 (second majority opinion).

269. *Id.*

270. *Id.*

271. 18 U.S.C. § 3150 (1976); *see* note 245 *supra* (discussing statute).

> Q. You had not observed Jo Ann Williams in your presence commit any act which constituted a felony, did you?
> A. I would have to say I did.
> Q. And what was that, sir?
> A. Well, because bail jumping and violating her bond restriction, as I understand it, is a felony, and everyone who is placed on bond is warned that violating bond restrictions or jumping bond is a felony punishable by up to five years in prison or up to a five thousand dollar fine.
> Q. So it would be accurate for me to say then, sir, that at the time that you arrested Jo Ann Williams on September 28, 1977, at the Atlanta Airport, you observed a felony which you felt was the jumping of bail, is that correct, sir?
> A. By being in violation of her bond restrictions.[272]

Such a mistake about the reach of section 3150 can hardly be considered "grounded in an objective reasonableness."[273] Section 3150 unambiguously applies only to willful failures to appear in court as ordered.[274] The Fifth Circuit traditionally has interpreted the statute as the plain language requires,[275] and the panel followed precedent when it addressed this issue.[276] Markonni had no reason to be unsure about the state of this area of the law. The language was plain, and the interpretation of the statute had been consistent. In fact, when the government reargued the case before the en banc court, it dropped the argument it had made to the panel that Markonni's arrest of Williams was justified under section 3150. Thus, Markonni's mistake was not objectively reasonable.

Further, if Markonni was unclear about the statute's meaning, it was unreasonable for him to fail to learn the scope of section 3150. If Markonni anticipated confronting Williams, and made himself aware of her travel restrictions, his failure to investigate whether a bail violation consititutes bond jumping before they met again in Atlanta also must be considered unreasonable.

The good faith exception also requires a court to assess the officer's subjective good faith. In *Williams*, the necessity of examining Agent Markonni's subjective good faith at the time of the arrest raises interesting possibilities that were never pursued in the trial court, perhaps because no one anticipated how the case later would be decided on appeal. It appears, however, that a searching inquiry into Markonni's subjective good faith in arresting Williams would have required examining his past record of arrests and searches. If Williams

272. Record at 25-26, United States v. Williams, Cr. 77-305A (N.D. Ga. 1977).
273. 622 F.2d at 841 n.4a.
274. 18 U.S.C. § 3150 (1976) provides in part:

> Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required . . . shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal . . . after conviction . . . be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

Id.
275. *See* United States v. Bright, 541 F.2d 471, 474 (5th Cir. 1976) (essence of crime of bail jumping is willful failure to appear before court as ordered), *cert. denied*, 430 U.S. 935 (1977); United States v. Logan, 505 F.2d 35, 37 (5th Cir. 1974) (same).
276. 594 F.2d at 91.

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had been given the opportunity to undertake this examination, an enterprising defense counsel would have learned that DEA Special Agent Paul J. Markonni is no fourth amendment neophyte. Numerous prior suppression cases have addressed the legality of his actions.[277] As the *Williams* court knew from the government's brief, the Sixth Circuit had already recognized Markonni's accomplishments as a fourth amendment trailblazer, and had noted that "Markonni has amassed an impressive drug enforcement record in Detroit, resulting in a number of opinions of this Court exploring the boundaries of permissible police activity in dealing with the difficult problem of drug trafficking."[278] Thus, a review of Markonni's fourth amendment career might shed some light on the inadvertency of his error in *Williams*.

Agent Markonni's work has involved policing airports for drug couriers.[279] In most of his early exploits, he relied on a straight-forward theory of probable cause, followed by a search incident to the arrest, to justify seizure of the sought-after evidence.[280] Although Markonni often has been successful, he

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277. We have found these additional cases reporting on Markonni's efforts, which have sometimes involved genuinely creative efforts to refashion fourth amendment law: United States v. Herbst, 641 F.2d 1161 (5th Cir. 1981); United States v. Berry, 636 F.2d 1075, 1077 (5th Cir. 1981); United States v. Berd, 634 F.2d 979, 981 (5th Cir. 1981); United States v. Turner, 628 F.2d 461 (5th Cir. 1980); United States v. Canady, 615 F.2d 694 (5th Cir. 1980); United States v. Andrews, 600 F.2d 563, 565 (6th Cir. 1979); United States v. Roundtree, 596 F.2d 672, 673 (5th Cir. 1979); United States v. Elmore, 595 F.2d 1036, 1037 (5th Cir. 1979); United States v. Troutman, 590 F.2d 604, 605 (5th Cir. 1979); United States v. Lewis, 556 F.2d 385, 387 (6th Cir. 1977); United States v. McCaleb, 552 F.2d 717, 719 (6th Cir. 1977); United States v. Hunter, 550 F. 2d 1066, 1068 (6th Cir. 1977); United States v. Prince, 548 F.2d 164 (6th Cir. 1977); United States v. Pratter, 465 F.2d, 227, 229 (7th Cir. 1972); United States v. One 1976 Cadillac Seville, 477 F. Supp. 879, 880 (E.D. Mich. 1979); United States v. McClain, 452 F. Supp 195, 196 (E.D. Mich 1977); United States v. Coleman, 450 F. Supp. 433, 435 (E.D. Mich. 1978); United States v. Dewberry, 425 F. Supp. 1336 (E.D. Mich 1977); United States v. Miles, 425 F. Supp 1256 (E.D. Mich 1977); United States v. Allen, 421 F. Supp. 1372 (E.D. Mich. 1976); United States v. Floyd, 418 F. Supp. 721 (E.D. Mich. 1976); United States v. Griffin, 413 F. Supp. 178 (E.D. Mich. 1976); United States v. Scott, 406 F. Supp. 443 (E.D. Mich. 1976).

278. United States v. Wright, 577 F.2d 378, 379 (6th Cir. 1978), *cited in* Supplemental Brief for Appellant on Rehearing En Banc at 12 n.2, United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

279. Most of his cases have involved airport encounters. At one point Markonni estimated that he had made 175 arrests at the Detroit Metropolitan Airport alone. United States v. Allen, 421 F. Supp. 1372, 1374 n.1 (E.D. Mich. 1976).

One of Markonni's earliest cases involved a different type of work and raised issues unlike those of the airport cases that came later. In United States v. Pratter, 465 F.2d 227 (7th Cir. 1972), the court described a raid on a house occupied by two University of Indiana students to seize a package containing hashish that had been shipped to them from Bombay, India inside a plaster of paris statue. *Id.* at 228-29. All of the evidence found in the raid was suppressed, because the agents participating, among them Markonni, waited only a few seconds for a response to their knock at the door before rushing in. *Id.* at 232-33. The court, in an opinion by Judge (now Justice) Stevens, held that the agents had not been refused entry before their break in. *Id.*

Markonni, a minor actor in the drama, showed signs of the enterprising attitude that would stamp his later efforts. The "second or two," or "couple seconds," that in the lead agent's testimony separated their announcement of authority and purpose from the break-in became, when Markonni testified, "[s]everal seconds; I would say probably ten seconds, ten to fifteen seconds." *Id.* at 229 n.2. Markonni did admit, however, that "I hadn't actually planned to enter the residence that soon . . . ." *Id.*

280. United States v. Dewberry, 425 F. Supp. 1336 (E.D. Mich. 1977), is a typical case from this period in Markonni's career. While on duty at the Detroit Metropolitan Airport, Markonni saw two women depart a flight from Los Angeles and join a man who was waiting for them. *Id.* at 1337. Markonni thought he recognized the man, Michael Lee, as a drug trafficker whom he had encountered in another case. *Id.* Lee wrote a name, address, and phone number on a piece of paper and handed it to a third woman who had joined the group. *Id.* The third woman, rather than the passengers, went to claim the baggage. *Id.* As Lee and the two other women then tried to leave the airport, agents accompanying Markonni stopped and questioned them. *Id.* When they responded evasively, the agents took them to a private office in the airport. *Id.* Markonni then brought the third woman and the suitcase she had claimed into the same office. *Id.* at 1338. The agents placed Lee and the three women under

also has suffered his share of set-backs.[281] Sometimes, Markonni's frustrations have resulted from his more inventive approaches to airport drug enforcement. In *United States v. Wright*,[282] for example, Markonni retrieved a suspect's suitcases from the airport baggage claim area and brought them to the suspect.[283] Markonni then arrested him in an attempt to justify a search of the suitcases as incident to the arrest.[284] The Sixth Circuit concluded that Markonni had gone too far; it declined to sanction this manipulation of the doctrine of search incident to arrest and held that the heroin Markonni had found should have been suppressed.[285]

More recently Markonni has relied on the suspect's purported voluntary cooperation to sidestep fourth amendment requirements. Because detaining suspects during initial questioning requires a showing of articulable suspicion, Markonni has tried to leave them free to walk away, at least in the eyes of the law.[286] Similarly, instead of forcing suspects to accompany him to an office at the airport for additional questioning, and thereby run the risk that a court will require probable cause yet find it absent (as happened earlier in his career), Markonni has encouraged his suspects to come along voluntarily.[287] Once

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arrest and then searched the suitcase, where they discoverd heroin. *Id.* The district court held that the initial stop was based on reasonable suspicion and that the evasive responses gave the agents probable cause to arrest. *Id.* Thus, the search of the suitcase was proper as incident to a valid arrest and the heroin was admissible. *Id.*

281. In several cases courts have suppressed evidence because Markonni detained or arrested on insufficient cause. *See, e.g.*, United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) (no probable cause to arrest suspect who appeared nervous and matched DEA profile); United States v. McClain, 452 F. Supp. 195, 199-200 (E.D. Mich. 1977) (no probable cause to arrest suspect who appeared nervous and exhibited other innocent behavior); United States v. Coleman, 450 F. Supp. 433, 440-41 (E.D. Mich. 1978) (no probable cause to arrest suspect who was black and not carrying luggage); United States v. Miles, 425 F. Supp. 1256, 1259 (E.D. Mich. 1977) (no probable cause to arrest suspect based on anonymous tip and observation of suspect meeting description engaged in innocent behavior); United States v. Floyd, 418 F. Supp. 724, 728 (E.D. Mich. 1976) (no probable cause to arrest suspects who were nervous, trying not to appear together, and carrying little luggage); United States v. Van Lewis, 409 F. Supp. 535, 543 (E.D. Mich. 1976) (no probable cause to arrest suspect on sole basis of DEA profile), *aff'd on other grounds*, 556 F.2d 385 (6th Cir. 1977).

Figuring in several of these cases was the suspect's resemblance to the Drug Enforcement Administration's "drug courier profile," which is a list of characteristics, each of which is innocent in itself, but which, in combination, the DEA deems typical of airline passengers who are working as drug couriers. Markonni himself was instrumental in the profile's development. United States v. McClain, 425 F. Supp. at 199. The Sixth Circuit, in *United States v. McCaleb*, found that correspondence with some elements of the profile could not by itself justify a *Terry* stop. 552 F.2d 717, 720 (6th Cir. 1977). The Supreme Court reached a similar conclusion in Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam), (no probable cause for investigatory stop of suspect based on suspect's arrival time, behavior, and point of embarkation).

282. 577 F.2d 378 (6th Cir. 1978).

283. *Id.* at 379.

284. *Id.* at 379-80.

285. *Id.* at 382.

286. *See* United States v. Berry, 636 F.2d 1075, 1079 (5th Cir. 1981) (suspects "seized" when Markonni told them they had violated law); United States v. Berd, 634 F.2d 979, 984-85 (5th Cir. 1981) (no fourth amendment seizure when Markonni merely approached suspects and identified himself).

287. In United States v. Berry, 636 F.2d 1075 (5th Cir. 1981), Markonni asked a pair of suspected drug couriers if they "would accompany him to the DEA office for further questioning" after a noncoercive encounter in the airport heightened the agent's suspicions. *Id.* at 1077. The court held that a "seizure" within the meaning of the fourth amendment occurred "somewhere en route to the DEA office," *id.* at 1079; nevertheless, it proceeded to find that the seizure was reasonable. *Id.* at 1081.

Markonni recently has been forced to operate within the constraints of a Fifth Circuit decision in another one of his cases, which held that a forcible trip to a private office within the airport—there, a Delta Airlines office—is an arrest requiring probable cause, not a mere investigatory detention requiring only articulable suspicion. United States v. Hill, 626 F.2d 429, 433-37 (5th Cir. 1981).

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there he has sought consent to search their luggage rather than trust the sometimes unreliable bounds within which he might conduct a search incident to arrest.[288]

This strategy has not been fool-proof either. Some defendants have disputed Markonni's testimony that they voluntarily consented to his requests.[289] In two cases, for example, courts concluded that Markonni extracted consent through means that rendered it involuntary.[290] On the whole, however, Markonni's strategy of eliciting the voluntary cooperation of suspects has been successful.[291] Further, in a number of cases Markonni has relied on the inclination of suspects to renounce their interest in their baggage, and then searched the bags on the theory that they had been abandoned.[292]

If Williams had had the opportunity to question Markonni's good faith, she might well have drawn attention to these earlier cases. They demonstrate how Markonni has consistently pushed the fourth amendment to the limit and frequently beyond, and arguably suggest that he has not always acted under a good faith belief that his conduct was lawful.

Markonni's career, however, was not the only ground for challenging his good faith in arresting Williams for violating her bond conditions. A close examination of the undeveloped record discloses several tantalizing hints that

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288. *See, e.g.*, United States v. Berry, 636 F.2d 1075, 1077 (5th Cir. 1981) (court will not consider whether defendants' consent was in their own best interests when record indicates consent to search after legal seizure voluntary); United States v. Turner, 628 F.2d 461, 465-66 (5th Cir. 1980) (consent not invalidated by defendant's testimony that agent overbearing when informing defendant of right to refuse consent to search); United States v. Elmore, 595 F.2d 1036, 1038-42 (5th Cir. 1979) (evidence seized in search admissible when defendant voluntarily consented to search, when agents had reasonable basis to ask defendant to consent, and when search conducted in non-coercive manner); *cf.* United States v. Troutman, 590 F.2d 604, 605-06 (5th Cir. 1979) (voluntary consent to search eliminates taint of illegal initial stop of suspect).

289. *See, e.g.*, United States v. Berry, 636 F.2d 1075, 1077 n.1 (5th Cir. 1981) (defendant denied consenting to search); United States v. Turner, 628 F.2d 461, 465 (5th Cir. 1981) (same); United States v. Troutman, 590 F.2d 604, 605-06 (5th Cir. 1979) (same).

290. United States v. McCaleb, 552 F.2d 717, 721 (6th Cir. 1977) (involuntary consent suggested by unconstitutional stop and arrest and statement by agent that suspect would be detained if he did not consent to search); United States v. McLain, 452 F. Supp. 195, 201 (E.D. Mich. 1977) (citing *McCaleb* in invalidating search under similar circumstances).

291. The attractiveness of seeking assistance from suspects in their own apprehension as a law enforcement technique has no doubt increased in light of two recent Supreme Court decisions, United States v. Mendenhall, 446 U.S. 544 (1980), and Reid v. Georgia, 448 U.S. 438 (1980) (per curiam). In *Mendenhall*, Justice Stewart, writing on this point only for himself and Justice Rehnquist, endorsed a lenient standard for determining when a police-citizen contact is a seizure within the meaning of the fourth amendment, or when a trip to a police office is non-consensual. 446 U.S. at 553-56. In *Reid*, three additional justices expressed general approval of this standard. 448 U.S. at 442-43 (Powell, J., with Burger, C.J. & Blackmun, J., concurring).

In two of Markonni's cases, however, the Fifth Circuit has expressed a limited view of the precedential value of *Reid* and *Mendenhall* on these points. *See* United States v. Berry, 636 F.2d 1075, 1078-79 (5th Cir. 1981) (*Mendenhall* not applicable because only two justices agreed on when seizure of person occurs in police-citizen contact); United States v. Berd, 634 F.2d 979, 984 (5th Cir. 1981) (*Mendenhall* not applicable for reason stated in *Berry*, and *Reid* not applicable because Court did not consider whether agent's initial approach constituted seizure). Consequently, the Fifth Circuit has, in these cases, looked to the standards set in one of its own prior decisions—set another Markonni case—to determine when a seizure had occurred. *See* United States v. Elmore, 595 F.2d 1036, 1042 (5th Cir. 1979) (police-citizen encounter not seizure when agents merely approached suspect and identified selves without using force or physical contact), *cert. denied*, 447 U.S. 910 (1980).

292. *See* United States v. Berd, 634 F.2d 979, 982-83 (5th Cir. 1981) (search upheld when suspect left briefcase on chair accompanying Markonni to office and later denied briefcase his); United States v. Canady, 615 F.2d 694, 695-96 (5th Cir. 1980) (search upheld when suspect repeatedly denied suitcase his).

Markonni arrested Williams for bond jumping as a mere pretext in order to search her for drugs. To begin with, Markonni's history of creative drug searches suggests that his principal interest was drugs. Further, when Markonni first saw Williams at the airport, he decided not to arrest her immediately, but instead to continue his surveillance.[293] If Markonni's true interest was only Williams' supposed bond jumping violation, he presumably would have arrested her as soon as he saw her. Furthermore, Markonni candidly revealed that drugs were on his mind when he arrested Williams.[294] Before searching her, he told her that he would release her if she had permission to leave Ohio "and if she had no drugs or narcotics on her person."[295] Although Markonni did check with the Ohio prosecutor to see whether Williams' travel restrictions were still in effect, he did not do so until after he had searched Williams and arrested her on drug charges.[296] If Markonni was not simply intent on conducting a search for drugs, and if he was at all solicitous of Williams' right not to be arrested and searched for a speculative offense, he could easily have called a prosecutor before the search while Williams waited. Thus, Markonni's discovery of drugs during his search of Williams was not mere fortuity, but rather seems to have been the intended and expected result of her arrest.

Although the trial record and Markonni's career and testimony at the suppression hearing may not demonstrate beyond all doubt that the agent acted either unreasonably or in bad faith, they do illustrate the kinds of evidence that bear on such determinations.[297] Moreover, insofar as these considerations

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293. *Id.* at 840.

294. Markonni saw Williams disembark from a non-stop flight from Los Angeles. He may have suspected that she was a "mule" for a drug operation, for he knew that Los Angeles was a drug supply center. 594 F.2d at 88, and that it was the source of Williams' drugs when he arrested her the year before. 622 F.2d at 846. Further, he had relied on similar information in the past to justify investigatory stops and arrests. *See, e.g.*, United States v. Hill, 626 F.2d 429, 430-31 (5th Cir. 1980) (suspect arrived from Los Angeles on trip of short duration and matched description of man known to be involved in drug trafficking); United States v. Elmore, 595 F.2d 1036, 1037 (5th Cir. 1979) (suspect arrived in Atlanta from Detroit, was on route to Birmingham, Alabama; Detroit and Birmingham two key cities on DEA distribution-use profile); United States v. Roundtree, 595 F.2d 672, 673 (5th Cir. 1979) (suspect arrived from Los Angeles and appeared to be concealing suspicious bulge on his calf); United States v. Williams, 594 F.2d 86, 88 (5th Cir. 1979) (suspect arrived from Los Angeles and was recognized by Markonni as person he had once arrested on drug charge); United States v. Troutman, 590 F.2d 604, 605 (5th Cir. 1979) (suspect arrived from Los Angeles and exhibited suspicious behavior); United States v. McCaleb, 552 F.2d 717, 719-20 (6th Cir. 1977) (suspect arrived from Los Angeles and conformed to DEA courier profile); United States v. Coleman, 450 F. Supp. 433, 435 (E.D. Mich. 1978) (suspect arrived from Los Angeles and did not carry any luggage); United States v. McClain, 452 F. Supp. 195, 196 (E.D. Mich. 1977) (suspect arrived from Los Angeles and only carried one small suitcase); United States v. Miles, 425 F. Supp. 1256, 1257 (E.D. Mich. 1977) (suspect arrived from Los Angeles and fit anonymous tipster's description); United States v. Allen, 421 F. Supp. 1372, 1373 (E.D. Mich. 1976) (suspect arrived in Detroit from Dallas on flight that might have connected with flight from Los Angeles and appeared nervous); United States v. Floyd, 418 F. Supp. 724, 726 (E.D. Mich. 1976) (suspect arrived from Los Angeles and did not claim any luggage); United States v. Van Lewis, 409 F. Supp. 535, 539-40 (E.D. Mich. 1976) (suspect traveled roundtrip between Detroit and Los Angeles in one day, had almost empty suitcase, and used alias in buying ticket).

295. Record at 27, United States v. Williams, Cr. 77-305A (N.D. Ga. 1977).

296. *Id.*

297. The good faith exception by its very nature will require courts to determine an officer's state of mind at the time of an arrest. Such findings in general are elusive and manipulable because they depend almost solely on the officer's own testimony and recollection. There will be a great temptation for an officer to shade or modify his testimony to portray good faith. This could result in the finding of good faith and the admitting of evidence, even in the extreme cases where an officer made an "honest" mistake for the deliberate purpose of obtaining sought-after evidence. Application of the exclusionary

suggest that Markonni acted unreasonably or in bad faith, they underscore the importance of examining the officer's misconduct, and highlight the Fifth Circuit's crucial error in *Williams*.

More generally, and ultimately more importantly, these cases also illustrate how successes and failures in defending against motions to suppress can shape the conduct of a conscientious law enforcement officer. Although Markonni has continued to operate right at, and frequently just over, the constitutional line, he seems quick to learn where that line is, and has adjusted his conduct accordingly. Thus, in the continuing saga of Agent Markonni's efforts to enforce the nation's narcotics laws within the changing confines of the fourth amendment, we have a remarkable demonstration of the exclusionary rule functioning as a specific deterrent.

C. THE COURT'S JUSTIFICATIONS FOR THE GOOD FAITH EXCEPTION

More important than the *Williams* court's shortcomings in applying its good faith exception to the facts before it, are the flaws in the court's justifications for adopting the exception itself. The claims which the court made for the exception—that it will not affect fourth amendment standards,[298] that it is consistent with the exclusionary rule's deterrence rationale,[299] and that it is supported by precedent[300]—are not only representative of those generally advanced by commentators who have advocated the exception, but are in large part drawn from their writings.[301] Thus, the *Williams* opinion provides a convenient focal point for analyzing the justifications underlying the good faith exception.

In laying the foundation for its good faith approach, the *Williams* court discussed the exclusionary rule in terms of costs and benefits. The court began by emphasizing that the exclusionary rule is "not itself a requirement of the Constitution," but rather a "judge-made rule," the only justification for which "is deterrence of future police misconduct."[302] On the cost side, the court argued that the rule must be considered "in light of its direct effect of preventing the 'whole truth' from being told and its byproducts of freeing guilty criminals and endangering society."[303] The court concluded that the rule should not apply "in those contexts where it does not effectively deter official misconduct."[304]

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rule despite a finding of good faith, at least in those cases where an officer had an ulterior motive for his "good faith" arrest, would protect against sham claims of "honest" mistakes.

There is another reason to be concerned about how carefully courts will scrutinize claims of good faith. In Scott v. United States, 436 U.S. 128 (1978) the Supreme Court said that, in evaluating officers' conduct, courts should use "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." *Id.* at 138. Although *Scott* involved wiretaps rather than traditional searches and seizures, its incorporation into the good faith exception would either eliminate analysis of the validity of officers' assertions of good faith or render such analysis perfunctory at best. Thus, the combination of *Scott* and *Williams* might result in an exception based solely on the objective question of general "reasonableness."

298. 622 F.2d at 847.

299. *Id.* at 842.

300. *Id.* at 843-45.

301. *See* notes 442-45 *infra* and accompanying text (discussing *Williams* court's reliance on secondary authority).

302. *Id.* at 841-42.

303. *Id.* at 842.

304. *Id.* at 841-42.

As an example of such a context, it cited "improper police actions taken in reasonable good faith" because "it makes no sense to speak of deterring police officers who acted on the good faith belief that their conduct was *legal* by suppressing evidence derived from such actions unless somehow we wish to deter them from acting at all."[305]

Although perhaps appealing in their simplicity, these justifications for the good faith exception are flawed. First, the court expressly denied that the good faith exception will diminish fourth amendment protections: "[I]t will be argued that today's decision undercuts the fourth amendment. Not so; it concerns only the exclusionary rule . . . ."[306] But the very breadth of the court's definition of good faith violation guarantees that many fourth amendment infringements will not even be examined by the courts. Second, the court claimed that the exception is justified because when a police officer acts in good faith the deterrent effect of the exclusionary rule is unnecessary.[307] This argument also must fail because it is based on the invalid premise that the exclusionary rule acts only as a simple deterrent; it ignores the wider effects of both general and systemic deterrence. Third, the court argued that the good faith exception is justified by legal precedent.[308] This contention, however, is based on misinterpretation and distortion of the relevant Supreme Court cases.

1. The Impact on the Fourth Amendment

The *Williams* court's good faith exception to the exclusionary rule has two facets: "technical violations"[309] and "factual mistakes."[310] The court borrowed its definitions from a law review article written by Professor Edna Ball.[311] As the article and the court describe the two branches, they roughly correspond to what are known in the criminal law as mistakes of law and mistakes of fact:

> In fourth amendment cases, most good faith violations concern the failure to meet the requirement of probable cause. Two basic types of violation are possible. First, an officer may make a judgmental error concerning the existence of facts sufficient to constitute probable cause. Such cases may be characterized as examples of "good faith mistake." Second, an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled. In each of these cases, the officer may be deemed to have committed a "technical violation."[312]

This sweeping characterization of good faith violations suggests that the good faith exception may not only cripple the exclusionary rule, but also drastically limit the protections of the fourth amendment. Because only egregious, inten-

305. *Id.* at 842 (emphasis in original).
306. *Id.* at 847.
307. *Id.* at 842.
308. *Id.* at 843-45.
309. *Id.* at 843.
310. *Id.* at 844.
311. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978).
312. *Id.* at 635-36, *cited in* United States v. Williams, 622 F.2d at 843-41.

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313. 622 F.2d at 843.
314. *See* notes 263-66 *supra* and
315. *Id.*
316. *See* United States v. Watson
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317. *Id.* (1959) (warrantless arrest law
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317. *See* United States v. Robinso
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318. *See* Michigan v. DeFillippo,
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2d Cir. 1974) (arrest pursuant to unco
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tional, and flagrantly illegal police misconduct would fall outside these two branches, the good faith exception will effectively insulate important areas of police misconduct from judicial oversight and control.

The Technical Violation Branch. In its discussion of the "technical violation facet" of the exception, the court averred that "the most common forms of technical violations made in good faith are arrests made in good faith reliance on a statute later declared unconstitutional or, as here, on a reasonable interpretation of a statute that is later construed differently."[313] This assertion is misleading on several counts. To begin with, cases involving a substantive criminal statute subsequently declared unconstitutional or construed differently are, in practice, very rare. Indeed, even *Williams* was not such a case.[314] Markonni's arrest did not involve a good faith, reasonable interpretation of a statute later construed differently.[315] Had *Williams* involved an arrest pursuant to a substantive criminal statute later invalidated or construed differently, the court could have upheld Markonni's conduct without the exception.

This result could have been reached because such cases, correctly understood, do not even raise fourth amendment issues. As long as a reasonably prudent person would be justified in believing that a suspect had committed, or was committing, an offense, an arrest in a public place for that offense is supported by probable cause and satisfies constitutional standards.[316] A search incident to that arrest is similarly valid.[317] The police conduct is lawful because the officer had probable cause at the time of the arrest, not because he acted in good faith. Probable cause at the time of arrest does not dissipate because a substantive criminal statute is later construed differently or held unconstitutional.[318] The same analysis applies to other fourth amendment stan-

313. 622 F.2d at 843.

314. *See* notes 263-66 *supra* and accompanying text (discussion of Markonni's misconduct).

315. *Id.*

316. *See* United States v. Watson, 423 U.S. 411, 414-15, 423-24 (1976) (postal officer's warrantless arrest of suspect in public place did not violate fourth amendment because based on probable cause; officer acted pursuant to constitutional statute authorizing warrantless arrest for felonies when reasonable grounds to believe offense is being or has been committed); Draper v. United States, 358 U.S. 307, 313-14 (1959) (warrantless arrest lawful if officer has probable cause; probable cause exists when facts within officer's knowledge sufficient to justify belief by reasonably cautious man that offense is being or has been committed); Carroll v. United States, 267 U.S. 132, 149 (1924) (warrantless search and seizure supported by probable cause does not violate fourth amendment).

317. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (custodial arrest based on probable cause is reasonable intrusion under fourth amendment; officer may search suspect incident to arrest without additional justification); Chimel v. California, 395 U.S. 752, 763 (1969) (incident to lawful arrest, officer may search arrestee's person and area within his immediate control to remove weapons and seize evidence).

318. *See* Michigan v. DeFillippo, 443 U.S. 31, 37-38 (1979) (officer's arrest of suspect pursuant to presumptively valid city ordinance lawful because action was supported by probable cause; later declaration that ordinance unconstitutional does not affect lawfulness of arrest); Michigan v. Carpenter, 69 Mich. App. 81, 83, 244 N.W.2d 338, 339-40 (1976) (officer's search of automobile pursuant to dangerous weapon statute after observing rifle case in plain view supported by probable cause; subsequent determination that rifle is not dangerous weapon within meaning of statute does not affect lawfulness of search). *But see* Powell v. Stone, 507 F.2d 93, 98 (9th Cir. 1974) (evidence obtained from search incident to arrest under ordinance later declared unconstitutional held not admissible in murder trial), *rev'd on other grounds*, 428 U.S. 465 (1976); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1174 (2d Cir. 1974) (arrest pursuant to unconstitutional statute is unlawful, evidence obtained during search incident to arrest inadmissible at trial); Hall v. United States, 459 F.2d 831, 840 (D.C. Cir. 1972) (en

dards such as reasonable, articulable suspicion to stop and frisk.[319] Moreover, in such cases the exclusionary rule is unnecessary to test the constitutionality or reach of the criminal statute. A defendant arrested and charged with violating such a statute can directly challenge its constitutionality,[320] or argue that it should be construed in a particular way.

The "most common forms" of technical violations shielded by the good faith exception, however, do involve fourth amendment violations. Such violations include arrests and searches made without probable cause or a warrant, and stops and frisks made without reasonable suspicion, either in reliance on prior court decisions[321] that arguably permit them or pursuant to statutes that explicitly authorize them.[322] Unlike defendants who are arrested for violating criminal statutes of a substantive nature, and who can argue during their case-in-chief that the laws should be invalidated or construed differently, victims of coercive police action carried out pursuant to either a criminal statute or a prior court decision of a procedural nature, have no recourse to challenge the police officer's authority except through a suppression motion. This is because a substantive criminal statute carries its own penalty apart from that which is imposed for crimes uncovered in a search incident to the arrest. Thus, the victim of an arrest under an unconstitutional criminal statute of a substantive character has the opportunity and incentive to vindicate his rights at the trial for that offense. A criminal statute or prior judicial decision of a procedural

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banc) (evidence obtained during search incident to arrest under unconstitutional statute inadmissible at trial).

319. *See* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (per curiam) (officer's stop and frisk is lawful if facts available at moment of conduct justify belief in man of reasonable caution that action taken was appropriate); Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (officer's stop and frisk of suspect does not violate fourth amendment if supported by specific and articulable facts; such intrusion is reasonable if facts available to officer at time of action sufficient to warrant belief by reasonable man that action taken was appropriate).

320. *See* Grayned v. City of Rockford, 408 U.S. 104, 107 (1972) (defendant arrested and convicted pursuant to anti-picketing ordinance; ordinance held unconstitutional and conviction reversed); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (defendant arrested and convicted pursuant to vagrancy ordinance; ordinance held unconstitutional and conviction reversed).

321. By prior court decisions we refer to decisions establishing the ingredients of probable cause in a particular context, such as Aguilar v. Texas, 378 U.S. 108, 114 (1964) (information from informants), decisions delineating the nature and scope of the exceptions to the warrant requirement, such as United States v. Rabinowitz, 339 U.S. 56, 63-65 (1950) (fixing scope of warrantless search incident to valid arrest), *overruled*, Chimel v. California, 395 U.S. 752 (1969), and decisions defining the scope of the fourth amendment itself, such as Olmstead v. United States, 277 U.S. 438, 466 (1928) (search requires physical trespass), *overruled*, Katz v. United States, 389 U.S. 347 (1967).

322. A criminal statute or decision of a procedural character does not describe conduct that is a crime, but rather empowers police in certain instances to obtain warrants, conduct searches, or make arrests. Because the fourth amendment requires that an officer have probable cause before carrying out such actions, and, sometimes, that he secure a warrant as well, a statute or court decision authorizing them on less than probable cause or without a warrant when one is required violates the Constitution. *See* Ybarra v. Illinois, 444 U.S. 85, 90-91 (1979) (officer's search of defendant pursuant to state statute unlawful because not supported by probable cause; officer had no reason to believe defendant committing or had committed offense); *cf.* Payton v. New York, 445 U.S. 573, 588-89 (1980) (officer's warrantless and nonconsensual entry into private residence to arrest defendant pursuant to state statute is unconstitutional; statutory authority for warrantless entry does not affect determination). Although a legislature is free within the bounds of the Constitution to define the elements of a substantive criminal offense, and a court has the power to construe such a statute, neither a legislature nor a court may alter the requirements of the fourth amendment itself. Thus, an officer who violates the fourth amendment in reliance on a statute or decision that purportedly authorizes such conduct may not justify his constitutional infraction on the basis of his good faith or the reasonableness of his actions.

haracter, however, carries no penalty of its own. As a result, a victim of po-ce action undertaken pursuant to such a statute or decision has neither the ncentive nor the opportunity to challenge its constitutionality except through motion to suppress the evidence obtained. A good faith exception that ex-uses unconstitutional conduct taken in reliance on such statutes and decisions emoves that incentive and opportunity, and thereby ensures that police mis-onduct will occur and recur free from judicial correction.

Similarly, when evidence is uncovered in the course of an arrest or search made pursuant to a warrant, the validity of the warrant itself can be challenged only through a motion to suppress. Yet it seems clear that a search or arrest made in reliance on an invalid warrant also will be excused under the technical violations facet of the good faith exception.

While the *Williams* court demonstrated uncharacteristic self restraint by writing in a footnote that because "no warrant is involved here . . . nothing we say applies to factual situations where one has been obtained,"[323] the court's reasoning surely compels the conclusion that when a police officer acts in good faith reliance on a warrant, the fruits of his search should be beyond the reach of the exclusionary rule. Indeed, two of the decisions on which the court relied involve "good faith" searches pursuant to arguably defective warrants.[324] And, in its very definition of a "technical violation" the court included reliance "on a warrant that is later invalidated."[325] Thus, the technical violations branch of the court's exception is far wider than the court acknowledged, for it exempts from the reach of the exclusionary rule the fruits of any unconstitutional police conduct undertaken in good faith reliance on court decisions, statutes, and warrants.

Although the *Williams* court insisted that the good faith exception limits only the exclusionary rule and not the fourth amendment, it was plainly wrong. By defining "technical violations" to include good faith reliance on court decisions, statutes of a procedural nature, and warrants, the court insulated many fourth amendment violations from the deterrent effect of the exclusionary rule. The court justified this result on the ground that the exclusionary rule can have no deterrent effect when a police officer relies in good faith on a statute or prior court decision. This, too, is plainly wrong. By identifying the fourth amendment infirmities in the statute or decision on which the officer has relied, future fourth amendment violations will be prevented. The good faith exception ensures that this process of identification will be delayed or will not occur at all.[326]

The Good Faith Mistake Branch. The court's treatment of the "good faith mistake" branch also demonstrates that the good faith exception affects the fourth amendment as well as the exclusionary rule. The court suggested

323. 622 F.2d at 840 n.1.

324. *Id.* at 844-46 (citing United States v. Janis, 428 U.S. 433, 454 (1976); and United States v. Hill, 506 F.2d 315, 322 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975)). Although the court discusses these cases in the "mistake of fact" portion of its opinion, the court's point seems to be that reliance on a warrant establishes, or at least goes a long way toward establishing, reasonable good faith.

325. 622 F.2d at 841 (quoting Ball, *supra* note 311, at 638-39).

326. Exactly why the good faith exception will have this result is developed in greater detail in text at notes 349-55 *infra*.

that Agent Markonni made a reasonable good faith mistake in believing that Williams' violation of her bond condition authorized him to arrest her.[327] In addition to the court's error in failing to examine both the record and Markonni's background in addressing the good faith question,[328] this characterization indicates several flaws in the "good faith mistake" branch of the exception as the *Williams* court conceived and applied it.

The court's reasoning here is extremely confusing. To begin with, its characterization of Markonni's good faith mistake, which it describes at one point as "an action under a reasonable factual error about one element of the crime defined in section 3146,"[329] sounds like a mistake of law, rather than a mistake of fact. Indeed, it sounds suspiciously like the very mistake, "an action under a reasonable interpretation of the arrest power under section 3146 that was subsequently reconstrued by our panel," which the court described as an example of a good faith "technical violation."[330] Because section 3146 does not define a crime or have anything to do with arrest powers, it is unlikely to be a technical violation even under that broad rubric.[331] Thus, the court's meaning is unclear.

Not only did the court never specifically identify Markonni's putative mistakes, it failed to distinguish between the two branches of the exception. Nevertheless, the court reached out to fashion the broadest possible good faith exception by describing the case as presenting questions of both a good faith factual mistake and a technical violation.[332] In fact, however, the case presented neither.

Far more disturbing than the court's failure to identify Markonni's putative good faith mistake of fact, is its creation of an exception to the exclusionary rule for such mistakes. By insulating from the exclusionary rule all police conduct resulting from good faith mistakes of fact, the good faith exception will erode such key fourth amendment standards as "probable cause," "articulable suspicion," and "exigent circumstances," and will inevitably encourage a movement away from these traditional standards toward a test of general reasonableness in all fourth amendment situations.

A good faith mistake branch to the exception suggests that existing fourth amendment law fails to accommodate mistakes of fact. As discussed previously, however, the law does allow for police error in several ways.[333] For example, under current law, police action is judged from the standpoint of what the officer reasonably believed to be the facts at the time he acted.[334]

327. 622 F.2d at 844.

328. *See* notes 268-97 *supra* and accompanying text (discussing reasonableness and good faith of Markonni's conduct).

329. 622 F.2d at 846.

330. *Id.*

331. *See* note 229 *supra* (text of statute).

332. 622 F.2d at 846.

333. *See* notes 316-19 *supra* and accompanying text. We already have made this point in our discussion of the technical violation branch. This repetition is unavoidable, however, given the need to follow the structure of the court's opinion. That the same criticism applies to both branches of the court's exception is merely another indication of the invalidity of the *Williams* court's distinction between good faith mistakes and technical violations.

334. *See* notes 316-19 *supra* and accompanying text (discussing judicial standard for analyzing police conduct; citing cases).

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Thus, an arrest and incident search will be upheld if the police officer reasonably believed, on the basis of the facts as they appeared to him at the time, that he had probable cause to arrest and search, even though he discovers later that the suspect committed no offense.[335] Moreover, a stop will be sustained if grounded on reasonable, articulable suspicion, even though it turns out that there was nothing to be suspicious about,[336] and a warrantless entry of a house will be upheld if the police reasonably believed that exigent circumstances existed, even if upon entry they find that the suspect was not about to flee.[337]

Existing law also takes account of the legitimate interests of law enforcement officers in other ways. For example, the law recognizes that a policeman may be required to act quickly and, when so acting, should be given the benefit of the doubt as to the reasonableness of his actions.[338] An experienced officer may draw deductions from evidence that appears insignificant to a layman,[339] and an officer may rely on rumors, hearsay, the prior record of the suspect, and other evidence inadmissible at trial to support his determination of probable cause.[340] In addition, police action short of an arrest or full-blown search is permissible even when probable cause is lacking.[341] Finally, when the police act pursuant to a warrant, courts show greater deference to their factual judgments.[342]

Because the fourth amendment already accommodates an officer's factual mistakes,[343] the Fifth Circuit can only have meant one of two things if it intended to exempt from the exclusionary rule evidence that would be otherwise

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335. *See* note 316 *supra* (citing cases).

336. *See* note 319 *supra* (citing cases).

337. *See* Warden v. Hayden, 387 U.S. 294, 298 (1967) (officers' warrantless entry into house and search for suspect does not violate fourth amendment; exigencies of situation justified action). The Court has also held that exigent circumstances exist when the police have a reasonable belief that the evidence would be destroyed during the time it would take to get a warrant, and has permitted the police to search without a warrant in such circumstances. *See* note 130 *supra* (citing cases).

338. *See* Warden v. Hayden, 387 U.S. at 298-99 (police acted reasonably when they entered house in pursuit of armed robber; speed essential in such situation).

339. *See* United States v. Cortez, 449 U.S. 411, 418-19 (1981) (investigative stop of defendants does not violate fourth amendment; officers may gain legitimate basis for suspicion by utilizing objective facts which seem meaningless to untrained individual).

340. *See* Draper v. United States, 358 U.S. 307, 311 (1959) (officer may consider hearsay when determining probable cause); Brinegar v. United States, 338 U.S. 160, 172-73 (1949) (officer may consider prior police record of suspect when determining probable cause).

341. *See* note 118 *supra* (citing *Terry*).

342. *See* United States v. Ventresca, 380 U.S. 102, 106-07 (1965) (police action taken under warrant accorded preference; in marginal case, search under warrant may be sustainable when search without warrant would be held invalid).

343. One area where it is not clear that existing fourth amendment law accommodates reasonable, factual mistakes by the police is that of consent searches. In United States v. Matlock, 415 U.S. 164 (1964), the Supreme Court expressly left open the question whether a warrantless search was valid when the searching officers reasonably, but erroneously, believed that the consenting party had sufficient authority over the premises to authorize the search. *Id.* at 177 n.14. This issue is not an easy one. *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 58-64 (1974) (discussing complexities of consent to search dwelling by resident when search is directed against other resident). It should be resolved, however, by deciding if such a search is reasonable under the fourth amendment—whether the police should be required to seek a warrant "just to make sure"—not whether the evidence should be admitted under a good faith factual mistake exception to the exclusionary rule. It seems a pretty safe bet that the Court will eventually uphold such searches, as have other courts that have addressed the issue. *See* People v. Adams, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881 (1981) (evidence obtained in search based on good faith reliance on person's consent not suppressible upon discovery that person giving consent did not live on premises searched).

admissible. It must have intended either that a test of general reasonableness should replace the specific benchmarks of probable cause, reasonable suspicion, and exigent circumstances, or, at the very least, that evidence obtained in a search incident to an arrest should be admissible as long as the officer reasonably believed he had probable cause for the arrest, even though he did not. Even this more limited reading of the *Williams* court's good faith exception translates into a fundamental change in fourth amendment standards.[344]

This result, although not explicit in *Williams*, seems to follow ineluctably from the opinion. If the court did not intend to introduce, at least to some extent, a concept of general reasonableness into fourth amendment law, its development and application of a good faith mistake branch makes little sense. Other evidence within the opinion itself also suggests that the *Williams* court believed Markonni's actions should be judged under a test of general reasonableness. In summarizing the agent's conduct, the court referred to the fact that Markonni knew Williams "was arriving from the very city from which she had obtained the heroin that caused her first conviction."[345] This fact may be relevant to Markonni's suspicion that Williams was engaged in drug trafficking, and may well have been an important factor in Markonni's decision to make the arrest,[346] but it is obviously irrelevant to Markonni's authority to arrest Williams for violating her travel restrictions. Thus, unless the court sought to evaluate Markonni's actions under a test of general reasonableness, this observation is irrelevant.

Although the court claimed that a good faith exception does not diminish the protections of the fourth amendment, other evidence suggests that it knew better. As the author of the article upon which the court relied for its definition of the exception candidly admitted in a portion of her article that the court understandably did not quote:

> The good faith doctrine should not be judged by its effect on the exclusionary rule but by its effect upon the standards which define when citizens will be protected against government intrusion. To the extent that probable cause is the key to fourth amendment protections, the good faith exception diminishes the liberality of the fourth amendment . . . . In other words what is required is no longer "probable cause" as presently defined, but instead a "reasonable ground for belief."[347]

Thus, both branches of the court's exception drastically affect fourth amendment law. A good faith exception for technical violations will stifle litigation that otherwise would identify such violations.[348] An exception for good faith

344. It marks a shift from requiring probable cause to sustain an arrest to requiring probable cause *or something close to it*.

345. 622 F.2d at 846.

346. *See* text accompanying notes 293-96 *supra* (discussing possibility that bail jumping grounds for arrest merely a pretext to search for drugs).

347. Ball, *supra* note 311, at 655-56.

348. It will also stifle litigation with respect to the reach of the fourth amendment itself. Just as reliance on a prior decision regarding probable cause or the warrant requirement will excuse the officer, so would reliance on a decision defining what constitutes a search or seizure. This would be a most unfortunate result. *See* note 178 *supra*.

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352. *Id.* at 840.

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mistakes will erode the substantive standards of the fourth amendment, not merely affect the application of the exclusionary rule.

2. The Deterrence Justification

The *Williams* court's second justification for adopting the good faith exception was that the exclusionary rule should not be applied when an officer makes a good faith reasonable mistake of either fact or law. The court reasoned that, whatever the source of the officer's error, he acted in what he thought at the time was a legal manner.[349] The court argued, moreover, that applying the exclusionary rule in such a situation would " 'have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal.' "[350] Thus, any deterrent effect imposed by excluding the fruits of that error would be minimal and undesirable.

By adhering to this limited understanding of deterrence, the *Williams* court created a broad good faith exception to the exclusionary rule that shields all "reasonable" law enforcement mistakes under one of its two branches. The exclusionary rule, however, is not primarily a punitive device: it is a regulatory mechanism aimed at deterring police misconduct. Nevertheless, the *Williams* court adopted a retrospective view, and concluded that the exclusionary rule has no deterrent effect on good faith actions because an officer who acted in good faith cannot be deterred from that action by subsequently excluding its fruits.[351] The proper inquiry, however, is not whether the subsequent application of the exclusionary rule will deter a police officer who has acted in the good faith belief that he was right, but rather whether applying the exclusionary rule will reduce the number of fourth amendment violations in the future at an acceptable cost.

Because a police officer cannot be deterred from violating the Constitution unless he knows that his actions are in fact unconstitutional, future fourth amendment violations can only be deterred if courts examine police misconduct without regard to its good faith or consistency with existing standards. Although the *Williams* court indulged in the assumption that Markonni's conduct violated the fourth amendment,[352] it disposed of the case without deciding what precise violation he had committed. Indeed, the court's good faith exception practically guarantees that the violation never will be identified. Thus, as long as the limits of a DEA agent's authority to arrest for violations of bail conditions remain uncertain, law enforcement officers such as Markonni are left in welcome ignorance, free to make such "reasonable" mistakes in "good faith" forever. But if such arrests are unconstitutional, the good faith exception has failed to deter future fourth amendment violations by simply failing to identify the mistake itself.[353]

349. 622 F.2d at 846.
350. *Id.* at 842 (quoting 594 F.2d at 97-98 (Clark, J., dissenting))
351. *Id.*
352. *Id.* at 840.
353. A recent decision of the Kentucky Court of Appeals illustrates this crucial failing of the good faith exception. In Richmond v. Commonwealth, No. 80-CA-1366-MR (Ky. July 31, 1981) (copy on file at *Georgetown Law Journal*), the defendant challenged a district judge's authority to issue a search

The application of the exclusionary rule, in contrast, would achieve this deterrence because under the rule the constitutionality of the police action, rather than its good faith or reasonableness, is dispositive of the suppression issue. Moreover, the cost of this deterrence is small. In the rare cases where an honest and conscientious police officer could not have known that a court would subsequently determine that his actions violated the fourth amendment, the decision would not apply retroactively.[354] Consequently, the exclusionary rule will require the suppression of evidence only in the case that announces an unforeseeable rule of law.

The good faith exception to the exclusionary rule, therefore, is not consistent with the *Williams* court's deterrence justification for the approach. The court's claim that the exception will admit evidence only "when no deterrence is called for and none can in fact be had"[355] is unconvincing; it forgets that even when the exclusionary rule fails to have a simple deterrent effect on a police officer's good faith conduct, it nevertheless identifies new constitutional violations and, as the earlier discussion of *Delaware v. Prouse* demonstrated, instructs all officers that this conduct is contrary to the fourth amendment and will not be condoned.

3. The Support of Precedent

The second *Williams* majority endeavored to justify its good faith exception not only as consistent with both the fourth amendment and the deterrence purpose of the exclusionary rule, but also as the natural outgrowth of precedent and scholarly authority.[356] Yet its use of authority is utterly unconvincing. The *Williams* good faith exception is, to begin with, inconsistent with a number of recent Supreme Court decisions.[357] Moreover, because the *Williams* approach determines admissibility without ruling on new constitutional standards and because it denies the litigant the potential benefit of a successful

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warrant outside the territorial limits of his district. He argued that the warrant was invalid because the judge could not act outside of his district, and that all evidence discovered during a search conducted pursuant to the warrant should be suppressed. *Id.*, slip op. at 3. The court conceded that "[w]e doubt the authority of a district judge, while outside the territorial limits of his district, to issue a warrant for the search of premises outside his district." *Id.* at 4. Nevertheless, the court ruled that despite the questionable validity of the warrant, the evidence was admissible at trial because the officers who conducted the search had "acted reasonably and in good faith." *Id.* at 9.

More importantly, the court was ready to assume a constitutional violation, yet refused to determine the constitutionality of the officers' conduct, reasoning that "[w]e find it unnecessary to decide that particular issue . . . because we believe the fruits of the search should not have been suppressed even though the magistrate may not have had authority to issue it." *Id.* at 4. Thus, like Agent Markonni, these officers remain in happy ignorance as to the legality of their conduct and are free to repeat their actions in the "good faith" belief that they are within the limits of the Constitution.

In this case, the good faith exception will fail to deter future fourth amendment violations because the court failed to identify the officers' mistake. In addition, by refusing to resolve the underlying constitutional issue, the court left the standards of the warrant requirement in doubt. Thus, *Richmond* illustrates how the good faith exception will retard the development of fourth amendment law, and encourage a general reasonableness standard for examining police misconduct.

354. *See* note 432 *infra* (discussing retroactivity).

355. 622 F.2d at 847.

356. *See id.* at 840-41 (both reason and authority support good faith exception and demand explicit recognition of implicitly supported exception).

357. *See* notes 422-39 *infra* and accompanying text (discussing recent Supreme Court cases in which evidence excluded although officers' beliefs seem reasonably justified by good faith compliance with statutes not yet invalidated).

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359. 443 U.S. 31 (1979).

360. 622 F.2d at 843.

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362. 443 U.S. at 33.

363. *Id.*

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365. *Id.* at 33.

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367. *Id.* at 33.

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fourth amendment challenge, it departs drastically from traditional principles upon which the Supreme Court decides fourth amendment cases.[358]

The *Williams* court conceived of its good faith exception as having two facets: technical violations and factual mistakes. It divided its discussion of authority accordingly. Although the court seems to have assigned precedent randomly to each facet, this discussion nevertheless follows the *Williams* format.

Technical Violations Facet. The *Williams* court relied principally upon *Michigan v. DeFillippo*[359] to support this branch of its good faith exception to the exclusionary rule.[360] Although the court suggested that the facts of the two cases are "closely analogous,"[361] there is little similarity between them. The Supreme Court in *DeFillippo* analyzed only the concept of probable cause; it did not consider the reach of the exclusionary rule as an independent issue. Thus, *DeFillippo* and *Williams* are entirely different cases and whatever support the *Williams* court purported to find in the prior decision of the Supreme Court was illusory.

In *DeFillippo*, Detroit police officers saw a man and a woman in an alley where the officers had gone to investigate the reported presence of two drunks.[362] As the officers approached, the woman was in the process of lowering her slacks.[363] Not surprisingly, one of the officers asked what the two were doing, and the woman responded that she was about to relieve herself.[364] The officers asked the man to identify himself, and DeFillippo gave obviously false, contradictory, and evasive answers.[365] The officers then arrested him for violating a Detroit ordinance that made it a misdemeanor for a person so stopped to refuse to properly identify himself.[366] A search incident to this arrest uncovered drugs in DeFillippo's pockets.[367] An intermediate Michigan appellate court held the ordinance unconstitutionally vague and ordered the evidence suppressed.[368]

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358. *See* notes 394 & 432 *infra* and accompanying text (traditionally litigant entitled to suppression in case determining new standards, but *Williams* neither gives litigant benefit nor requires court to articulate standards).

359. 443 U.S. 31 (1979).

360. 622 F.2d at 843.

361. Arguably the court was correct in this reading of the facts of the cases. *Compare* Michigan v. DeFillippo, 433 U.S. at 40 (search yielding drugs merely incident to arrest for obvious violation of ordinance) *with* United States v. Williams, 622 F.2d at 840 (search yielding drugs merely incident to arrest for obvious violation of court order).

362. 443 U.S. at 33.

363. *Id.*

364. *Id.* The Court concluded that this behavior, occurring at 10 p.m., warranted further police investigation. *Id.* at 37.

365. *Id.* at 33.

366. *Id.* at 34 (*citing* DETROIT, MICH., CODE § 39-1-52.3 (1976)).

367. *Id.* at 33.

368. People v. DeFillippo, 80 Mich. App. 197, 203, 262 N.W.2d 921, 924 (1977), *rev'd*, 443 U.S. 31 (1979). The appellate court expressly rejected the argument that good faith reliance on a presumptively valid ordinance renders the arrest legal. *Id.* at 200, 262 N.W.2d at 923. The Michigan Supreme Court denied further review. 443 U.S. at 35.

The *Williams* court's misreading of *DeFillippo*, a case involving the substantive scope of the fourth amendment, as a case involving only the application of the exclusionary rule, suggests an essential connection between the rule and the underlying right. *See* text accompanying notes 527-37 *infra* (char-

The United States Supreme Court granted *certiorari* because of contrary Fifth Circuit holdings that an arrest under analogous circumstances did not violate the fourth amendment.[369] Because the officers had ample cause to conclude that DeFillippo had violated the ordinance, the only issue before the Court was whether the officers lacked probable cause within the meaning of the fourth amendment simply because the ordinance was later declared unconstitutional.[370] The Court held the arrest valid because probable cause depends on the facts and circumstances at the time of the arrest and does not dissolve upon the subsequent judicial declaration that an ordinance is unconstitutionally vague.[371] Therefore, the Court held that the evidence obtained incident to the arrest was admissible.[372]

Thus, *DeFillippo* declared no new exclusionary rule theory. Rather, it adhered to the traditional view that probable cause turns on whether the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."[373] In short, the *DeFillippo* Court withheld application of the fourth amendment exclusionary rule because it found that no fourth amendment violation had occurred.[374] It is a long step, however, from *DeFillippo* to the Fifth Circuit's position in *Williams* that whether or not a fourth amendment violation has occurred, the exclusionary sanction should not apply when the violation is a "good faith reasonable" one.[375] *DeFillippo* involved only rights; *Williams* purports to involve only remedies. Thus, contrary to the argument in *Williams*, *DeFillippo* did not imply a good faith exception to the exclusionary rule; it held, rather, that evidence need not be suppressed when no fourth amendment violation occurs.

The *DeFillippo* decision simply makes the point that an arrest that in some sense violates another constitutional provision—because the underlying criminal statute is invalid—does not, for that reason alone, also violate the fourth amendment. *DeFillippo* holds that the probable cause standard does not incorporate other constitutional protections. Thus, a successful constitutional challenge to an ordinance on grounds of vagueness does not automatically render an arrest under the ordinance a fourth amendment violation.[376] This point perhaps can be clarified with a hypothetical variation on *DeFillippo*.

Suppose an airport law enforcement officer saw DeFillippo distributing leaf-

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acterizing recent arguments of Chief Justice Burger and Judge Wilkey against exclusionary rule as attacks on the fourth amendment itself).

369. *Id.* at 35. The Court identified United States v. Carden, 529 F.2d 443 (5th Cir. 1976), and United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971), as Fifth Circuit cases holding that the fourth amendment does not require the suppression of evidence that is obtained incident to an arrest made pursuant to a presumptively valid ordinance. 443 U.S. at 35.

370. *Id.* at 37.

371. *Id.* The Court noted a possible exception when the ordinance is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 38.

372. *Id.* at 36.

373. *Id.* at 37.

374. *Id.* at 40.

375. *See* 622 F.2d at 840 (exclusionary rule exception applies when evidence discovered in actions "taken in good faith and in the reasonable, though mistaken, belief that they are authorized").

376. *See* 443 U.S. at 40 (unconstitutionally vague ordinance violates due process but does not undermine validity of arrest for violating ordinance).

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lets that described the sublime tranquility that could be attained by joining a local religious cult. The officer arrested DeFillippo and charged him with violating a recently enacted ordinance that purported to protect the susceptible from the influence of such cults.. The ordinance made it an offense to distribute any leaflets of this sort without advance approval of the Port Authority. The officer knew this leaflet had not been approved. In searching DeFillippo incident to the arrest, the officer discovered drugs.

In this hypothetical problem, should the court suppress the drugs on the ground that the ordinance violated DeFillippo's first amendment rights? Few would argue that the fourth amendment exclusionary rule should be pressed into service here, unless perhaps the officer knew that the ordinance would never pass constitutional muster[377] or that its enforcement was a mere pretext for a search.[378]

In our society, arresting DeFillippo for handing out pamphlets would be unlawful in one sense because he had broken no valid law. It is difficult to see, however, why that arrest, which was based on probable cause, or the search incident to it, would violate the fourth amendment.[379] Whatever values would be served by suppressing evidence in such a case would be largely distinct from those protected by the fourth amendment. Because other avenues for testing the ordinance's constitutional validity are readily available,[380] suppression of the evidence would be unnecessary. This is why not all arrests made pursuant to invalid laws violate the fourth amendment.

Had the *Williams* court been less eager to issue its sweeping mandate and more willing to decide the case before it, it could have relied on *DeFillippo* to conclude that the exclusionary rule should not apply; thus the court need not have based its decision on the novel theory that it rushed to cobble up, but instead could have admitted the evidence on the ground that Markonni's arrest, even if in some sense illegal, did not violate the fourth amendment. The court's rationale could have been that although the statutes did not authorize Markonni's warrantless arrest of Williams, the arrest nevertheless did not violate the fourth amendment because it was made in a public place on probable cause.[381] The plausibility of such a result depends on precisely what mistake the court assumes Markonni made. On the assumption that Markonni's only

377. *See* note 371 *supra* (*DeFillippo* court noted that some statutes might be so flagrantly unconstitutional that any reasonably prudent person would recognize their unconstitutionality).

378. *See* Michigan v. DeFillippo, 443 U.S. at 40-41 (Blackmun, J., concurring) (if defendant could show that police use ordinance as pretext for investigatory searches and arrests, it would rebut any claim of good faith reliance by officers).

379. The distinction between the arrest that we have hypothesized, which would in one sense violate the first but not the fourth amendment, can perhaps be sharpened by imagining a society where protections against unreasonable searches and seizures include a zealously enforced exclusionary rule but where religious expression is strictly regulated. In such a society, there obviously would be no reason to suppress evidence seized from DeFillippo because in that society his arrest and search would constitute perfectly acceptable law enforcement conduct. In our society, the arrest would be unlawful not because it was an unreasonable search and seizure, but rather because it would interfere with the free exercise of religion.

380. The most obvious method of challenging this hypothetical ordinance would be through a motion to dismiss on first amendment grounds.

381. *See, e.g.*, Michigan v. DeFillippo, 433 U.S. at 36 (warrantless arrest in public place constitutional if officer has probable cause); Adams v. Williams, 407 U.S. 143, 148-49 (1972) (same); Carroll v. United States, 267 U.S. 132, 155-56 (1924) (same).

mistake was in thinking that contempt was an offense against the United States, this result would be acceptable. For even if a warrant is required to set in motion the contempt process or to revoke bond, the function of the warrant here is fundamentally different from the warrant requirement of the fourth amendment.[382] Had the *Williams* court relied on *DeFillippo* to conclude that no fourth amendment violation had occurred, however, the Fifth Circuit would not have had this occasion to create its good faith exception to the exclusionary rule.[383]

The other Supreme Court authority that the *Williams* court relied on to support the technical violation facet of the good faith exception is a retroactivity case, *United States v. Peltier*.[384] In that case, roving border patrol agents discovered marijuana during a warrantless search of Peltier's car seventy miles from the Mexican border.[385] At the time it was conducted, the search conformed to regulatory standards previously upheld by lower federal courts.[386] In the interval between the search and Peltier's trial, however, the Supreme Court in *Almeida-Sanchez v. United States*[387] struck down these standards as unreasonable. The *Peltier* Court declined to apply *Almeida-Sanchez* retroactively to invalidate the search.[388] It reasoned that the border patrol agent had acted "in good-faith compliance with then-prevailing constitutional norms"[389] and therefore that retroactive application of *Almeida-Sanchez* would not serve the purposes of the exclusionary rule.[390]

The *Williams* court's reliance on *Peltier* was misplaced. *Peltier* was a retroactivity case; *Williams* was not. By its very nature as a retroactivity case, *Peltier* was concerned with the applicability of a standard that the Supreme

382. In this instance the role of the warrant would be merely procedural. *Compare* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (search of customer present during execution of search warrant for premises violates fourth amendment, which protects people not places) *with* 622 F.2d at 837-38 (by analogy to Federal Rule of Criminal Procedure 42, warrant requirement for contempt "merely procedural").

383. This is not to say that the Court's decision in *DeFillippo* is without difficulties. It is worth noting that the Michigan statute was challenged below and held unconstitutional on both fourth amendment and due process grounds. *See* People v. DeFillippo, 80 Mich. App. 197, 201-203, 262 N.W.2d 921, 923-24 (1977) (ordinance void for lacking reasonable notice of what constitutes crime and for undercutting reasonable suspicion standard of *Terry*), *rev'd*, 443 U.S. 31 (1979). The Supreme Court, however, focused only on the unconstitutional vagueness of the statute and assiduously avoided addressing the independent fourth amendment issue. *See* 443 U.S. at 34 (Michigan interlocutory appeal held statute "unconstitutionally vague"). The Court overlooked the fact that there is a doctrinal affinity between the principles that an excessively vague statute violates due process and that an arrest without probable cause (or investigatory detention without articulable suspicion) violates the fourth amendment. Each of these rules seeks to limit police discretion; each seeks to curb capricious or discriminatory law enforcement by requiring relatively clear-cut standards for when the police may act. *Compare* Delaware v. Prouse, 440 U.S. 648, 663 (1978) (invalidating stops made for no articulable reason as encouraging unbridled police discretion) *with* Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 168 (1972) (invalidating statute for vagueness because gives unfettered discretion to police).

384. 422 U.S. 531 (1975).

385. *Id.* at 532-33.

386. *Id.* at 540.

387. 413 U.S. 266 (1973).

388. 422 U.S. at 542.

389. *Id.* at 536, 540.

390. *Id.* at 539, 542. The *Peltier* Court identified deterrence and judicial integrity as the purposes of the exclusionary rule. The Court concluded that applying *Almeida-Sanchez* retroactively would serve neither a deterrent purpose, because compliance with constitutional norms should be encouraged rather than deterred, nor the imperative of judicial integrity, because no willful disobedience was being condoned by the court. *Id.* at 536.

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Court had established before *Peltier* was decided. In *Williams*, there was no change in constitutional standards between arrest and trial. The standard for lawful arrest was, and still is, probable cause. If Markonni violated Williams' fourth amendment rights when he arrested her, he violated prevailing—albeit imperfectly articulated—constitutional norms.

An even more disturbing aspect of the *Williams* decision is that the court did not glean from *Peltier* the importance of articulating norms. Unlike the Supreme Court, the *Williams* court was content to leave the norms indefinitely inchoate.[391] It is only because of the first majority's opinion that we know Markonni's actions were, in the court's view, legal.[392] From the perspective of the second opinion, however, the first opinion is wholly unnecessary because the second majority requires only that Markonni have acted "in good faith and in reasonable though mistaken" belief that his actions were lawful.[393] Thus, the question whether Markonni's understanding of the law was indeed mistaken would remain unanswered, and the exclusionary rule would not apply to the fruits of his conduct. As argued in the previous section, unless the court determines the propriety of the conduct, future conduct of similar nature will necessarily be reasonable. Thus, the circle is complete, and Markonni and other law enforcement officers can go on indefinitely arresting for violations of conditions of release, in blissful but reasonable ignorance of what the law requires. Surely, this is not what the Supreme Court's decision in *Peltier* countenanced.[394]

Good Faith Mistake Facet. The scraps of authority that the *Williams* court ferreted out to support the good faith mistake facet of the exception provide even less sustenance than the authority it advanced to support the technical violation exception. The court relied primarily on the Supreme Court's

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391. 622 F.2d at 840 (error to suppress heroin regardless whether Williams' violation of bond condition was crime warranting arrest).

392. *Id.* at 839 (first majority opinion) (arrest for criminal contempt arising from breach of court order restricting travel valid therefore search incident to arrest proper).

393. *Id.* at 840 (second majority opinion).

394. *See* 422 U.S. at 535-39 (by implication) (whether to apply exclusionary rule retroactively presupposes courts will have new constitutional principles to apply).

In addition to Supreme Court opinions, the *Williams* court cited earlier Fifth Circuit opinions that similarly lend scant support for the exception. In United States v. Carden, 529 F.2d 443 (5th Cir. 1976), and United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971), the court did nothing more than anticipate Michigan v. DeFillippo, 443 U.S. 31 (1979). In each, the court stated that an arrest pursuant to a statute violative of due process did not necessarily violate the fourth amendment. *See* United States v. Carden, 529 F.2d at 445 (dictum) (arrest made in good faith reliance on statute not yet declared unconstitutional is valid regardless of statute's actual constitutionality); United States v. Kilgen, 445 F.2d at 289 (court's overturning conviction due to invalid statute does not automatically render previous arrest illegal).

The *Williams* court also relied on United States v. Hill, 500 F.2d 315 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975). In that case, however, the court was not at all concerned with the officer's good faith. It merely held that a formal error in the warrant application procedure that does not violate the fourth amendment need not lead to suppression. *Id.* at 322 (no fourth amendment violation when warrant issued on deficient affidavit but bolstered by sworn oral testimony in front of issuing magistrate). The *Williams* court's reliance on United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979), is similarly misplaced. That case did not even raise a fourth amendment issue. The court merely declined to extend the exclusionary rule to suppress evidence obtained in violation of the Posses Comitatus Act, 18 U.S.C. § 1385 (1976), which prohibits military involvement in civilian law enforcement. 594 F.2d at 85. Thus, even the Fifth Circuit precedent that the *Williams* court managed to muster fails to support the technical violation branch of the good faith exception.

decision in *United States v. Janis*.[395] The central issue in *Janis* was whether to extend the exclusionary rule to a federal civil proceeding by or against the United States when the contested evidence was seized unlawfully by a state police officer.[396] This issue is completely irrelevant to *Williams*, which dealt with the admissibility at a federal criminal trial of evidence seized illegally by federal officials. Moreover, the Court's reasoning in *Janis* also lends no support to the good faith exception. The holding in *Janis* in no way turns on the good faith of the arresting officers, but solely on the Court's determination that any additional deterrent effect on state officials of extending the rule to federal civil proceedings was outweighed by the costs of suppression.[397] Finally, *Janis* does not support the good faith mistake facet of the exception because the officers' mistake in *Janis* involved reliance on a technically deficient warrant rather than a factual error.[398]

The *Williams* court also relied on *Michigan v. Tucker*,[399] which is probably best understood as yet another retroactivity case. Moreover, *Tucker* is not even a fourth amendment case; rather it is a fifth amendment case concerning derivative use of a tainted statement.[400] The *Tucker* Court reversed a state

395. 428 U.S. 433 (1976).

396. *Id.* at 434.

397. *Id.* at 454.

398. The warrant relied on was insufficient under Spinelli v. United States, 393 U.S. 410 (1969), which was decided three weeks before Janis' trial but after the search had taken place. United States v. Janis, 428 U.S. at 437. Although the Court has never decided whether *Spinelli* represented a break with prior law and should therefore be denied retroactive effect, this sequence of events in *Janis* may have played some part in the Court's decision. In his dissenting opinion in Desist v. United States, 394 U.S. 244 (1969), Justice Harlan used *Spinelli* as an example of a fourth amendment decision that would be given retroactive effect because it merely explicated the pre-existing probable cause standard. *Id.* at 263 (Harlan, J., dissenting).

399. 417 U.S. 433 (1974). *Tucker* and *Peltier* provided Justice Rehnquist with an opportunity to discuss his view of the exclusionary rule as a remedy with limited purposes. In his *Peltier* opinion, he cited both United States v. Calandra, 414 U.S. 338, 348 (1974) (exclusionary rule judicially created remedy to safeguard rights through deterrent effect rather than personal constitutional right of aggrieved; therefore application restricted to areas where remedial objectives best served), and Michigan v. Tucker, 417 U.S. 433, 447 (1974) (where official action pursued in complete good faith, deterrence rationale loses much of its force).

400. Michigan v. Tucker, 417 U.S. at 439. The relevance of *Tucker* to a fourth amendment case like *Williams* is questionable because *Tucker* proceeds from the premise that the *Miranda* requirement is a mere sub-constitutional judicial creation. *See id.* at 446 (police conduct departed from prophylactic standards but did not abridge rights). Fourth amendment standards, on the other hand, are constitutionally mandated, even if the fourth amendment exclusionary rule is not. *See* United States v. Peltier, 422 U.S. 531, 542 (1975) (fourth amendment does not require suppression under particular circumstances even if fourth amendment rights violated). Yet the Court itself has cited *Tucker* in the fourth amendment context. *See id.* at 539. *See generally* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 118, 120, 123 & n.131 (1978).

Surely both *Tucker* and *Peltier* provide much material from which the Court's more skillful domino players may yet, if they are inclined, reduce exclusionary rule protections. *Cf.* Amsterdam, *supra* note 88, at 351 (skillful domino players have prescient purpose in moves they make, such as explanatory statement in one opinion as basis for extension in different situation). The Supreme Court, however, has not followed the most extreme implications of either opinion. Indeed, as discussed in text below, the Court's actions may repudiate some of those implications, particularly in cases where the police relied on statutes expressly authorizing unconstitutional searches or seizures. *See, e.g.*, Payton v. New York, 445 U.S. 573, 574, 600 (1980) (statute authorizing warrantless entry into suspect's home for routine felony arrest does not outweigh constitutional standard of reasonableness); Ybarra v. Illinois, 444 U.S. 85, 95-96 (1979) (statute authorizing detention and search of person present when officers executing search warrant for premises does not outweigh long prevailing constitutional standard of probable cause).

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401. 417 U.S. at 435, 4
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404. 384 U.S. at 476.
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412. *Id.* at 96 n.11.
413. *Id.*

court decision[401] suppressing evidence that the police had discovered by following a lead which Tucker inadvertently provided during an interrogation not meeting the standards subsequently pronounced in *Miranda v. Arizona*.[402] As in *Peltier*, when the Court decided *Tucker* it had already articulated the constitutional standards to govern future police conduct.[403] Of course, in *Miranda*, when the Court first promulgated those standards, it excluded the evidence.[404] As noted above, the *Williams* court would decline both to articulate the controlling constitutional standards and to apply the exclusionary rule. Finally, the mistake in *Tucker* was, as in *Janis*, legal rather than factual. Thus, *Tucker* provides no support for the factual mistake branch of the court's exception.

Precedent Ignored. Not only did the *Williams* court cite cases that fail to support the good faith exception, but, more importantly, it largely ignored recent Supreme Court decisions with which it is irreconcilable. *Ybarra v. Illinois*,[405] the one case that the *Williams* court tried to distinguish, provides a good example.

Ventura Ybarra was patronizing the Aurora Tap Tavern when the police arrived to execute a search warrant for the tavern and its bartender.[406] Upon entering the tavern, the officers announced their purpose and proceeded to frisk each of the patrons for weapons under the authority of an Illinois statute.[407] During this search, the officers discovered heroin in Ybarra's pants pocket.[408] The Court held that none of the facts supporting the warrant, and nothing learned while executing it, gave the officers probable cause to arrest or search Ybarra.[409] Despite the statute, the Court held the search unconstitutional,[410] and reversed Ybarra's conviction because the drugs should have been suppressed.[411] The Court distinguished *DeFillippo* on the ground that, unlike the statute in *Ybarra*, the statute in *DeFillippo* did not purport to allow searches without probable cause.[412] Indeed, it did not purport to authorize searches at all but only to create a new substantive offense. Thus, all searches under the *Ybarra* statute violated the fourth amendment, whereas only some searches under the *DeFillippo* statute did.[413] The *Williams* court utterly ig-

401. 417 U.S. at 435, 447-50.
402. 384 U.S. 436 (1966).
403. The Court noted that the officers in *Tucker*, acting before these standards were announced in *Miranda*, were "guided, quite rightly, by the principles established in *Escobedo v. Illinois*, 378 U.S. 478 (1964)." 417 U.S. at 447.
404. 384 U.S. at 476.
405. 444 U.S. 85 (1979).
406. *Id.* at 88-89.
407. *Id.* The statute authorized law enforcement officers to detain and search any person found on premises being searched pursuant to a warrant to protect the officers from attack and prevent the disposal or concealment of anything described in the warrant. *Id.* at 87.
408. *Id.* at 89.
409. *Id.* at 90-92. The Court also rejected the argument that the search was proper either under *Terry* or under an extension of *Terry*. *Id.* at 92-96.
410. *Id.* at 96 n.11. The Court stated: "This state law, therefore, falls within the category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches." *Id.*
411. *Id.* at 90, 96.
412. *Id.* at 96 n.11.
413. *Id.*

nored this obvious distinction in its rush to shield from the exclusionary sanction all unconstitutionally seized evidence that is the fruit of "reasonable good faith" police action.[414]

The *Williams* court, however, did endeavor to explain *Ybarra*: "Exclusion of evidence seized without any probable cause is an entirely different question from suppression of evidence seized upon a good-faith and reasonable belief in the existence of probable cause."[415] Applying the *Williams* court's rationale, however, the officers in *Ybarra* would have been excused under the good faith exception. The Illinois legislature told them that their frisks were proper, and no authority had since ruled otherwise. Their conduct seemed to fit perfectly into the Fifth Circuit's exception to the exclusionary rule for technical violations committed when an officer "rel[ies] upon a statute which is later ruled unconstitutional."[416]

Alternatively, the officers in *Ybarra* might reasonably have thought that probable cause was not required because the Supreme Court has approved several types of intrusions in which officers lack probable cause.[417] The search in *Ybarra*, however, did not sufficiently resemble any of these intrusions.[418] If a relevant distinction exists between these different types of fourth amendment violations—searches conducted in the mistaken belief that probable cause was present[419] and searches conducted in the mistaken belief that probable cause was not necessary[420]—the *Williams* court failed to articulate it.[421]

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414. *See* 622 F.2d at 847 (when conduct taken in reasonable, good faith belief that it was proper, court shall not apply exclusionary rule).

415. *Id.* at 846.

416. 622 F.2d at 841 (quoting Ball, *supra* note 311, at 638-39).

417. *See, e.g.*, Michigan v. Summers, 101 S. Ct. 2587, 2595 (1981) (decided after *Ybarra* and *Williams*) (approved detention of homeowner without probable cause during execution of valid warrant to search home for contraband); Pennsylvania v. Mimms, 434 U.S. 106, 109-11 (1977) (per curiam) (approved order to traffic offender to exit lawfully stopped car though no probable cause or articulable suspicion); United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (approved brief roving border patrol vehicle stops near border and interrogation of occupants on reasonable articulable suspicion of illegal aliens although no probable cause); Terry v. Ohio, 392 U.S. 1, 30 (1968) (approved protective stop and frisk for weapons on reasonable articulable suspicion although no probable cause).

418. *Compare* Ybarra v. Illinois, 444 U.S. 85, 91-96 (1979) (detaining and searching customer merely present on searched premises unlawful because no probable cause, despite prevailing statutory authority) *with* Pennsylvania v. Mimms, 434 U.S. 106, 109-11 (1977) (per curiam) (ordering traffic offender out of lawfully stopped car lawful without probable cause) *and* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (dictum) (briefly stopping car in border area lawful on articulable suspicion without probable cause) *and* Terry v. Ohio, 392 U.S. 1, 30 (stopping suspect and frisking for weapons lawful without probable cause as long as carefully limited and based on articulable suspicion).

419. *See* Johnson v. United States, 333 U.S. 10, 13 (1948) (mistaken belief that opium odor outside hotel room of unknown occupant constituted probable cause to search); United States v. Di Re, 332 U.S. 581, 587 (1947) (mistaken belief that defendant's mere presence in suspected car constituted probable cause).

420. *See* Torres v. Puerto Rico, 442 U.S. 465, 472 (1979) (mistaken belief that no probable cause necessary because airport search "functional equivalent" of border search); Dunaway v. New York, 442 U.S. 200, 216 (1979) (mistaken belief that no probable cause necessary because custodial questioning lesser intrusion than normal arrest); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (mistaken belief that no probable cause necessary for spot check of motorist's license and registration).

421. Although several Supreme Court decisions express doubts about the efficacy of the exclusionary rule, they would not support the *Williams* outcome because none of the decisions permit evidence obtained in violation of prevailing fourth amendment standards to be used directly in the government's case-in-chief. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 484-86 (1976) (exclusionary rule not extended to federal habeas corpus claim by prisoner previously afforded full and fair consideration of fourth amendment claim because minimal value for judicial integrity or deterrence); United States v. Janis, 428 U.S. 433, 454 (1976) (exclusionary rule not extended to federal civil proceeding because insufficient

Moreover, in a broad range of decisions, the Supreme Court has expanded the contours of fourth amendment protections in ways that would be unforeseeable to even the most prescient police officers. For example, in *Chimel v. California*,[422] the Court held that a search incident to an arrest in a residence is unreasonable if it extends beyond the immediate reach of the arrestee.[423] In *Katz v. United States*,[424] the Court held that eavesdropping or wiretapping constitutes a search even if it does not involve a physical trespass.[425] In *Delaware v. Prouse*,[426] the Court held that random traffic stops constitute unreasonable fourth amendment intrusions.[427] In *Payton v. New York*,[428] the Court held that unless there are exigent circumstances officers must secure a warrant before they may enter a person's home to arrest her.[429] In *Steagald v. United States*,[430] decided after *Williams*, the Supreme Court extended *Payton* to require a search warrant before officers may enter the home of a third party to make an arrest pursuant to a warrant.[431]

Although to one degree or another these decisions may have been prefigured by earlier opinions, they were sufficiently unforeseeable that the officers who searched Chimel's home, entered to arrest Payton and Steagald, eavesdropped on Katz, or stopped Prouse, all would pass a test of reasonable, good faith conduct. This consideration is one of the factors that has led the Court to apply such decisions only prospectively.[432] In keeping with traditional practice, however, the Court has not paused to consider whether to withhold the

likelihood of deterrence); United States v. Calandra, 414 U.S. 338, 354 (1974) (exclusionary rule not extended to grand jury proceeding because insufficient incremental deterrence).

422. 395 U.S. 752 (1969).

423. *Id.* at 768 (overruling United States v. Rabinowitz, 339 U.S. 56 (1950), and Harris v. United States, 331 U.S. 145 (1947)).

424. 389 U.S. 347 (1967).

425. *Id.* at 353 (overruling Goldman v. United States, 316 U.S. 129 (1942), and Olmstead v. United States, 277 U.S. 438 (1928)).

426. 440 U.S. 648 (1979).

427. *Id.* at 663 (case of first impression).

428. 445 U.S. 573 (1980).

429. *Id.* at 574 (denying permissibility of entry into suspect's home to make warrantless arrest as expressly left open in United States v. Watson, 423 U.S. 411, 418 n.6 (1976)).

430. 101 S. Ct. 1642 (1981).

431. *Id.* at 1644.

432. The Supreme Court has ruled that three factors are to be considered in deciding whether a decision establishing a "new" rule of law should be given retroactive effect: (1) the purpose of the new standards; (2) the extent of reliance upon old standards by law enforcement authorities; and (3) the effect of retroactive application on the administration of justice. Stovall v. Denno, 338 U.S. 293, 297 (1967). This approach was first formulated in Linkletter v. Walker, 381 U.S. 618 (1965), where the issue was whether *Mapp v. Ohio*, extending the exclusionary rule to the states, should be given retroactive effect. *Mapp* did not, of course, create "new" fourth amendment law, but simply required the states to provide a specific remedy for conduct that had been unconstitutional since *Wolf v. Colorado*. Nevertheless, the Court denied retroactive effect to *Mapp*. As the Court assessed the three factors: (1) the primary purpose of the exclusionary rule, deterrence of police misconduct, would not be advanced by making the rule retroactive, and "the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late," *id.* at 637, (2) the states had reasonably relied on prior law in failing to enforce the fourth amendment through the exclusionary sanction, and (3) retroactive application would: "tax the administration of justice to the utmost," because:

> Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory [sic] will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

benefits of the exclusionary rule from the defendants in these cases on the theory that the searches were conducted in reasonable good faith. Yet, the *Williams* court would withhold the benefit of the exclusionary rule to the defendant without either announcing the new law or clarifying the old. Thus, its approach is wholly inconsistent with the principles upon which the Supreme Court has traditionally resolved fourth amendment issues.

Even more strikingly, the *Williams* court ignored *Whitely v. Warden*,[433] in which the Supreme Court suppressed evidence despite the undisputed good faith of the arresting officers.[434] In *Whitely*, the arresting officers received a radio bulletin that a warrant was out for the defendants' arrest.[435] The officers had no reason to know that the affidavit underlying the warrant was insufficient.[436] Based on the radio bulletin, the officers arrested the defendants and uncovered stolen property[437] during a subsequent search of their car.[438] Although the conduct of the arresting officers was unquestionably in good faith, the Supreme Court ordered the evidence suppressed, holding that the arrest and search violated the defendants' fourth amendment rights.[439] Although the *Williams* court did not say whose good faith was at issue, it implied that the relevant inquiry is into the good faith of the arresting officer.[440] If this is true,

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Id. at 437-38.

This analytical approach was then extended in Desist v. United States, 394 U.S. 224 (1969), where the issue was whether *Katz v. United States*, a decision extending substantive fourth amendment protections, should be given retroactive effect. It is now the test not only for "new" fourth amendment decisions, but for constitutional decisions in other areas of criminal procedure. *See* Stovall v. Denno, 388 U.S. 293, 299-301 (1967) (Court declines to apply decisions in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), retroactively).

When the retroactivity of a "new" fourth amendment decision is at issue, the first factor will always cut strongly—indeed, it appears, decisively—against retroactive application. Because in the Court's view the only purpose of the exclusionary rule is to deter, there is no point in applying it retroactively to police conduct that has already occurred, and which was permissible under prior law. The second factor, whether relevant officials reasonably relied on prior law, turns on the degree to which the "new" decision represents a break with prior law. Normally, the relevant officials are the police, and the Court has been generous in finding that reliance was reasonable. In United States v. Peltier, 422 U.S. 531, 542 (1975), for example, the Court held that Almeida-Sanchez v. United States, 413 U.S. 266 (1973), was non-retroactive even though it did not constitute, at least to the dissenters, a "sharp break" with the past. *See* 422 U.S. at 548 (Brennan, J., with Marshall, J., dissenting) (*Peltier* good illustration of dangers of addressing prospectivity when "sharp break" standard not met). *See also* Desist v. United States, 394 U.S. 244, 276-77 (1969) (Fortas, J., dissenting) (in refusing to apply *Katz v. United States* retroactively, Court rewards police who unreasonably relied on clearly discredited doctrine of *Olmstead v. United States*, and penalizes police departments that follow developing case law). The lower courts, too, have been quick to find reasonable reliance on prior law. *See* 3 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 11.5, at 696 n.58 (citing cases). Finally, the third factor, which since *Linkletter* seems to have become something of a make-weight, also has invariably counted against retroactive application of fourth amendment decisions because applying such decisions retroactively is a "difficult and time-consuming task." Desist v. United States, 394 U.S. at 251. In addition, of course, application of the exclusionary rule has no bearing on guilt or innocence. Thus, the short of it is that the Supreme Court has denied retroactive effect to every one of its fourth amendment decisions that even arguably established a "new" rule of law.

433. 401 U.S. 560 (1971).

434. *Id.* at 569.

435. *Id.* at 563.

436. *Id.* at 568.

437. *Id.* at 563.

438. *Id.*

439. *Id.* at 568-69.

440. *See* 622 F.2d at 840, 846-47 (referring to "officers in the course of actions' . . . taken in good faith" and later referring to "conduct" without specifying whose, but concluding that arresting Agent Markonni acted in good faith).

owever, *Williams* is totally inconsistent with *Whitely*. *Williams* would insu- ate an arresting officer whenever an independent third party obtained a warrant.[441]

The *Williams* court's marshaling of secondary material to support the good faith exception is equally unpersuasive. The principal scholarly support for the second *Williams* opinion is Edna F. Ball's article on the "reasonable" exception to the exclusionary rule.[442] Professor Ball argues for an exception to the exclusionary rule by analogizing to a series of nineteenth-century admiralty cases contributing to the development of the concept of probable cause. She notes that in these cases of seizure and prize and suits for malicious prosecution the defendant could usually assert a good faith reasonable mistake as at least a partial defense.[443] From this, she argues that a similar defense should be available to suppression of evidence motions because fourth amendment claims also involve probable cause questions.[444]

Professor Ball's article contains some interesting material, but her central argument is unsound.[445] First, in most of the tort cases that she discusses, the defendant who prevailed on a good faith reasonable mistake defense was not entirely vindicated. In seizure and prize cases, for example, he could escape punitive damages, but would still be liable for actual damages.[446] Thus, a more appropriate analogy to these early civil cases lies in the present Supreme Court law of suppression. The police officer who arrests without probable cause will lose the immediate fruits of his misconduct, but derivative fruits, evidence obtained only as an indirect result of his misconduct, may be admissible if he acted in good faith.[447]

More importantly, the fact that the law of suppression and the law of prize and capture share the concept of probable cause does not imply any further similarity. Professor Ball might just as well argue that because suppression

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441. *But cf.* Whitely v. Warden, 401 U.S. at 568 (otherwise illegal arrest cannot be insulated from challenge by instigator's decision to rely on fellow officers to arrest). In fact, as far back as 1959, the Supreme Court expressly rejected the argument that the good faith of the arresting officer can substitute for probable cause. *See* Henry v. United States, 361 U.S. 98, 102 (1959) ("good faith on the part of arresting officers is not enough"). In the words of Justice Stewart in Beck v. Ohio, 379 U.S. 89 (1964), "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Id.* at 97 (warrantless public arrest and incident search unlawful because uncorroborated tip insufficient to constitute probable cause). If subjective good faith need only be "reasonable" for evidence to survive suppression, then all that insulates us from the unbridled police discretion that Justice Stewart foresaw is an ad hoc, virtually standardless, judicial review of "reasonableness."

442. Ball, *supra* note 311.

443. *See id.* at 639–40 (good faith total defense to malicious prosecution and partial defense against punitive damages in seizure and prize).

444. *Id.* at 639.

445. She is guilty of what an old logic textbook deemed "false analogy" and "a copious source of error." G. JOYCE, PRINCIPLES OF LOGIC 285 (3d ed. 1926). "Few things carry conviction to the mind so much as a striking analogy, and few things can be more misleading." *Id.*

446. Ball, *supra* note 311, at 639.

447. *See* United States v. Ceccolini, 435 U.S. 268, 279 (1979) (testimony of witness admissible because sufficient attenuation between illegal search and finding witness); *cf.* Dunaway v. New York, 442 U.S. 200, 216 (1979) (confession inadmissible because no intervening events between illegal detention and confession); Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (confession inadmissible because state failed to show attenuation between illegal arrest and confession). Although the Court uses a multifactor analysis to determine attenuation, the flagrancy of the official misconduct is of particular importance. 422 U.S. at 603-04.

issues as well as prize and capture cases involve concepts of probable cause, both ought to be heard in admiralty. Or she might also argue that courts should adopt another doctrine from the law of prize and capture for the law of the fourth amendment. In old admiralty cases, a seizure of a vessel was held justified with or without probable cause if, after the fact, the vessel turned out to be subject to seizure.[448] Fourth amendment law, however, has always been otherwise; an unlawful search cannot be made lawful by what it turns up.[449] The incorporation of this admiralty rule into the fourth amendment would do away with the suppression doctrine altogether: If the search were fruitless, no evidence would be found to suppress; if it were successful, no fourth amendment violation would be found no matter how glaring the absence of probable cause.[450]

The court also relied on a short piece by Professor Charles Alan Wright,[451] which he first delivered as a lecture to undergraduates.[452] Wright's same basic arguments for a watered-down exclusionary rule have been discussed extensively elsewhere and will not be repeated here.[453] In any event, the *Williams*

448. The admiralty cases that Ball relies on involved seizures of ships that it turned out were not subject to forfeiture. Probable cause was set up as a defense by the captain of the capturing ship. When the seized ship was subject to capture, that was the end of the matter. The capturing ship was liable only if the seized ship was not subject to forfeiture *and* there was no probable cause to believe that it was. *See* Slocum v. Mayberry, 15 U.S. 1, 9-10, 2 Wheat. 1, 5 (1817); The Charming Betsy, 6 U.S. 64, 120-22, 2 Cranch 34, 68-70 (1804). The seizure, in other words, could be justified by its results.

Justice Rehnquist and Chief Justice Burger have also suggested that the Court may have gone wrong in Byars v. United States, 273 U.S. 28 (1927), when it rejected the doctrine that a search is justified by what it turns up and held that probable cause could only be measured by objective facts known to the officer prior to the search. *Id.* at 29. "This result," Justice Rehnquist has written, "while taken for granted today, was not inevitable. The Court certainly could have held that discovery of the article sought is compelling evidence that the search was justified, or that any violation of the Fourth Amendment in such a case was harmless error." California v. Minjares, 443 U.S. 916, 921 (1979) (Rehnquist, J., with Burger, C.J., dissenting from denial of stay). This doctrine, to use Professor Amsterdam's terminology, presupposes a purely "atomistic," rather than "regulatory" interpretation of the fourth amendment. *See* note 88 *supra*.

449. United States v. Di Re, 332 U.S. 581, 595 (1947); Byars v. United States, 273 U.S. 28, 29 (1927).

450. Professor Ball anticipated such objections and attempted a rejoinder. But it is only a rephrasing of her basic argument, with all of its weaknesses intact:

> One may well ask why the teaching of early civil cases is relevant to the development of modern rules of criminal procedure . . . . Putting aside the conceptual overlap of tort and crime, perhaps the best answer is that the nineteenth century civil cases dealing with unintentional mistake concerning probable cause gave early courts their only opportunities to consider the definition of probable cause and the effect that good faith would have on the implementation of that doctrine. Since the Court has been willing to use these decisions to define probable cause in later criminal cases, it is not inappropriate to look to them for guidance in the area of good faith as well.

Ball, *supra* note 311, at 641 (footnotes omitted). The overlap to which Professor Ball refers is not as great as she suggests. The similarity is between the elements of torts and the elements of crimes. The only similarity that would help Professor Ball's argument would be one between torts and the suppression doctrine. The analogy between these two areas, however, is in fact quite weak. That Professor Ball's article persuaded the *Williams* court demonstrates how eager it was to adopt the good faith exception.

451. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

452. *Id.* at 736.

453. *See generally* Geller, *supra* note 70, at 656-84.

Professor Wright asserted that empirical evidence failed to establish the prophylactic efficacy of the exclusionary rule; Wright, *supra* note 452, at 739; that much police activity is not even aimed at securing convictions and therefore cannot be reached by the rule; *id.* at 740; that the police rarely learn whether the evidence they seized was excluded or admitted, or why; *id.*; and that police in fact do not

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court both misinterpreted Wright's argument and failed to evaluate his cost-benefit analysis. Wright did not argue for the reasonable good-faith exception embraced by *Williams*. Instead, he favored the American Law Institute (ALI) proposal.[454] This proposal would apply the exclusionary remedy only when there has been a substantial fourth amendment violation.[455]

A more substantive criticism is that Wright misperceived the costs associated with the exclusionary rule, costs that he deemed so excessive as to require a major cut back of the rule.[456] According to Professor Wright, in addition to freeing an assortment of gamblers, junkies, and gun-toters, the rule has freed these heinous criminals of Supreme Court infamy: the child-murderer Coolidge;[457] the brutal rapists, Davis[458] and Bumper;[459] DeForte, a Teamsters official who used his position to extort payments;[460] and Berger, who conspired to bribe a high public official.[461]

Although Professor Wright acknowledged that the suppression of evidence does not always result in the unleashing of a criminal who preys again, he asserted that:

> In most or all of the cases the evidence held to have been obtained illegally was so critical to the prosecution's case that it is unlikely that [the defendants] could be convicted without it. The probable result is that the defendants in these cases, who have been found guilty of heinous crimes, will go free.[462]

Had he checked, Professor Wright would have learned that his assumptions were wrong. Of this group, all three violent offenders were convicted, on remand, without the suppressed evidence.[463] Only DeForte and Berger escaped

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understand the arcane fourth amendment standards that the courts set for their conduct. *Id.* at 740-41. For a discussion of the similar arguments of Professor Oaks, see text accompanying notes 147-60 *supra*.

454. Wright, *supra* note 452, at 745.

455. The ALI test of a substantial violation focuses on: (1) the seriousness of the violation; (2) the effect on the criminal justice system as a whole; and (3) the prejudicial effect to the particular defendant. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3, Commentary 407 (Apr. 15, 1975 Proposed Official Draft). *See generally* Coe, *ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 7 n.22 (1975); Wright, *supra* note 452, at 745.

456. *See* Wright, *supra* note 452, at 742 (rule not justified without evidence that benefit to society outweighs obvious cost of freeing heinous criminals).

457. *Id.* (citing Coolidge v. New Hampshire, 403 U.S. 443, 494 (1971) (Black, J., concurring and dissenting) (kidnapping fourteen-year-old, slashed throat, shot in head, and left on side of road)).

458. *Id.* (citing Davis v. Mississippi, 394 U.S. 721, 722 (1969) (rape in victim's home)).

459. *Id.* (citing Bumper v. North Carolina, 391 U.S. 543, 558-59 (1968) (Black, J., dissenting) (twice raped woman at gunpoint, shot her and companion, and left them for dead)).

460. *Id.* (citing Mancusi v. De Forte, 392 U.S. 364, 365 (1968) (union official convicted of extortion)).

461. *Id.* (citing Berger v. New York, 388 U.S. 41, 44 (1967) (bribed Chairman of New York State Liquor Authority)).

462. *Id.*

463. *See* Davis v. State, 255 So. 2d 916, 919, 922 (Miss. 1971) (second conviction on rape upheld with victim's purged testimony read at trial), *cert. denied*, 409 U.S. 855 (1972); North Carolina v. Bumper, 5 N.C. App. 528, 532, 536 (1969) (rape charge not retried but convicted on assault and robbery); note 465 *infra* (Coolidge agreed to plea bargain instead of facing new trial).

Wright was especially reckless in saying that the exclusionary rule would be likely to free Davis. The evidence suppressed was a set of fingerprints taken from Davis during an illegal arrest. Davis v. Mississippi, 394 U.S. 721, 724-25 (1969). Justice Stewart suggested in dissent that the suppression was a useless act. *Id.* at 730 (Stewart, J., dissenting). There was probable cause to rearrest Davis because the victim subsequently identified him as her assailant. *Id.* Another set of fingerprints could be properly obtained, so conviction at retrial was a foregone conclusion. *Id.* The majority did not contest this point. On retrial, properly obtained fingerprints were admitted and Davis was convicted. Davis v.

further punishment.[464] Coolidge and Davis are both still behind bars.[465] Bumper served a substantial portion of his sentence and was granted parole just last year.[466]

As its final secondary source, the *Williams* court cited Judge Friendly's book, *Benchmarks*.[467] Yet, it did so with a simple, conclusory statement indicating that Judge Friendly favored the good faith exception,[468] and overlooking the narrowness of his rationale.[469] Judge Friendly assumes that the exclusionary rule operates only through a crude mode of specific deterrence, punishing the particular offending officer directly to teach him to do better the next time.[470] Judge Friendly's argument, however, ignores the other deterrent mechanisms of the rule discussed earlier in this article.[471] This cursory representation of support from Judge Friendly is misleading,[472] and is indicative of the flimsy authority that the *Williams* court offered for its decison. Thus, the ten judges who filed a special concurrence were surely correct in criticizing their brethren for " 'reach[ing] out' for a vehicle to change a long line of precedent."[473]

State, 225 So. 2d 916, 921 (Miss. 1971) (affirming conviction after retrial). It is surprising that Professor Wright, writing in 1972, missed all this.

464. *See* People v. Berger, 18 N.Y.2d 638, 638 (1966) (government stipulated that without evidence and leads from eavesdropping devices it would have no case), *rev'd on other grounds*, 388 U.S. 41 (1967). There is no reported case indicating that DeForte was ever retried.

465. Telephone conversations with *Coolidge* prosecutor, William Maynard (July, 1981) and *Davis* prosecutor, George Warner (July, 1981).

466. Telephone conversation with *Bumper* prosecutor, Herbert Pierce (July, 1981).

467. 622 F.2d at 841 (citing H. FRIENDLY, BENCHMARKS 260-62 (1967)).

468. *Id.* at 841 (referring to Friendly as writer "advocating exception").

469. *See id.* (Friendly suggested limiting suppression to fruit of intentionally or flagrantly illegal activity).

470. *See* H. FRIENDLY, BENCHMARKS 260 (1967) ("deter" suggests analogy to criminal law which punishes evil motives rather than mistaken ones; experiencing punishment is the only method of deterrence).

471. *See* notes 146-75 *supra* and accompanying text (rule also deters through general and systemic deterrence).

472. Equally significant is the secondary material that the *Williams* court does not consider. A limitation on the exclusionary rule somewhat similar to *Williams*' "reasonable, good-faith mistake" exception has been proposed before. As mentioned above, the American Law Institute Model Code of Pre-Arraignment Procedure proposed eliminating all but "substantial" breaches from the reach of the rules. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 8.02, Note 1 (Tent. Draft No. 3, 1970) (advocating use of exclusionary rule for seizures violating basic safeguards but not for non-prejudicial minor violations). In fact, the drafters considered but rejected a proposal virtually identical to the *Williams* holding. *See* Coe, *supra* note 455, at 7 (flexible "prejudice test" excluding unlawfully obtained statements and identifications rejected as ambiguous when ALI adopted substantiality test for search and seizure section). A similar test to that contained in the ALI proposal provision has been enacted in North Carolina. *See* N.C. GEN. STAT. § 15A-974(2) (1973) (suppression of evidence obtained as result of "substantial violation" determined by considering interest violated, extent of deviation from lawful conduct, willfulness, and deterrence). The literature concerning these various proposals is already vast; yet the *Williams* court, although undertaking a major refashioning of the exclusionary rule, altogether ignored it. This is not to suggest that the authors of law journal articles are entitled to see their works cited whenever a court later issues a decision involving the same topic. The debate on these questions, however, has been substantial, and the *Williams* court could have profited by exploring the literature more fully.

473. 622 F.2d at 848 (Rubin, J., with Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate & Thomas A. Clark, JJ., specially concurring) (quoting Crist v. Cline, 434 U.S. 981, 981 (1977) (Marshall, J., dissenting from order restoring case to calendar for oral argument)).

V. THE GOOD FAITH EXCEPTION IN PRACTICE

This article has examined both the fourth amendment exclusionary rule and the sweeping good faith exception announced by the Fifth Circuit in *United States v. Williams*. It has demonstrated the effectiveness of the rule as a deterrent to police misconduct, and has argued that a good faith exception will substantially undermine that effectiveness. In order to highlight the crucial flaws of the *Williams* approach, this section first describes the mischievous effects the exception will have on lawmaking in both trial and appellate courts. It then examines some typical fourth amendment violations that under the exclusionary rule lead to suppression of illegally-obtained evidence. By comparing the result of these violations under present law with the anticipated result under a good faith exception, the section demonstrates that any gain in successful prosecutions brought about by the application of the exception would be far outweighed by the consequent loss of constitutionally protected privacy.

A. THE GOOD FAITH EXCEPTION IN THE COURTS

1. The Hearing

Williams tells us next to nothing about how a trial court applying the exception should conduct hearings on motions to suppress. While the *Williams* court strained to promulgate its good faith exception in the broadest possible language, it was remarkably reticent in instructing the lower courts how to implement it. Specifically, the decision leaves open three crucial issues: what standards to use in assessing good faith or reasonableness; who will have the burden of proof; and what evidence will be admissible.

First, it is not clear what constitutes good faith or reasonableness in this context. One might suppose that by good faith mistake the court meant an honest mistake, not a sham mistake, but that is of little help. The only enlightenment the court gives as to what constitutes a reasonable mistake is that the officer's belief in the lawfulness of his action must be "based upon articulable premises sufficient to cause a reasonable and reasonably trained, officer to believe that he was acting lawfully."[474]

Second, the court left "for another day" the "proper allocation of the burden of proof."[475] As a consequence, once the defendant shows misconduct, we do not know whether the defendant must also prove bad faith and unreasonableness, or whether the burden shifts to the government to establish that the conduct was in good faith and reasonable.

This confusion raises a third problem. Whatever burden of proof is imposed, the government will present the officer's self-serving claim that he thought his actions were lawful.[476] To refute this assertion, the defendant will

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[474] Even this limited guidance seems to have been given as something of an afterthought. 622 F.2d at 841 n.4a.

[475] *Id.* at 847.

[476] Of course, police perjury may impede accurate finding of fact by the trial court. *See* P. MURPHY, POLICE POWER 187-88 (1969) (empirical study showing significant rise in percentage of false arrest reports in which evidence seized through "abandonment" after *Mapp v. Ohio*; report alleges that decision encouraged police to file false reports); J. SKOLNICK, JUSTICE WITHOUT TRIAL 214-[illegible] (because judicial decisions have failed to set clear standards, police often reconstruct events to

have to contest the officer's state of mind,[477] thus posing thorny evidentiary problems. It would seem, for example, that a primary focus of the hearing will necessarily be the officer's training. This highlights an anomaly of the good faith exception: proof by the defense that the offending officer was well-trained tends to disprove the officer's claim of good faith by showing that he knew better, while proof by the government that the officer was poorly-trained tends to prove the officer's good faith by showing that he did the best he could. Thus, police departments may have an incentive to leave their officers ignorant of the legal standards governing their conduct because an officer's claim of good faith is more credible if he has no reason to know that his conduct is unlawful.[478] This anomaly has the concomitant negative effects of both punishing police departments that efficiently regulate their officers by holding these officers to a higher standard, and rewarding inept departments by holding their officers to a lower standard.

While the good faith exception's objective requirement of reasonableness will admittedly mitigate these effects to some degree, the incentives introduced by the subjective requirement of good faith remain skewed. Moreover, the reasonableness requirement of the good faith exception raises additional problems of proof. By hypothesis, the exception comes into play only when the exclusionary rule would otherwise require suppression. Thus, however "reasonable" the officer's conduct, it is nonetheless unconstitutional. At some point, something has gone wrong either in the officer's judgment or in his training. The defendant thus must try to establish bad faith, by showing that the officer had sufficient training to know that his actions were unlawful, or unreasonableness, by showing the inadequacy of the officer's training. In either case, *Williams* leaves unresolved whether the defendant will be allowed to call as witnesses the police brass in charge of training and continuing education of line officers. If he is permitted to call these witnesses, then present suppression hearings, which opponents of the exclusionary rule criticize for consuming precious court time,[479] will seem positively fleeting by comparison to those born of the good faith exception. If the defendant is precluded from calling these witnesses, however, how can he make the necessary "expedition

"fabricat[e] probable cause"); Oaks, *supra* note 103, at 739-42 (increased police fabrication of probable cause in response to *Mapp*); Note, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87, 94-95 (1968) (empirical study demonstrating rise in abandonment claims by police supports conclusion that police have fabricated basis of arrest to meet requirements of *Mapp*).

477. This is, perhaps, one desirable feature of a good faith exception: it would conceivably require police officers to explain in court their understanding of the relevant fourth amendment law and why they felt that their actions were justified under it. This in turn might provide an added incentive for police departments to educate their officers in the law. In practice, however, it is unlikely that trial courts will conduct hearings on motions to suppress like a law school course in criminal procedure. In the end, the officer's bald assertion that he thought he had the right to do what he did will, if unchallenged, establish good faith. Moreover, the exclusionary rule without a good faith exception already provides police departments with the incentive to teach their officers the bounds of constitutionally permissible conduct.

478. *See* Kaplan, *supra* note 131, at 1044 (police department dedicated to crime control would have incentive to leave its officers uneducated about law so that constitutional violations could be labeled inadvertent).

479. *See* note 533 *infra* (citing critics of time spent on suppression motions).

into the mind of the police officers"[480] to prove bad faith or unreasonableness under *Williams*?

In practice, few trial courts will permit time-consuming inquiries into the training and motivations of individual police officers. The good faith exception gives trial courts a convenient method by which to side-step these questions, as well as the underlying fourth amendment issue itself, by simply excusing the officer's alleged mistakes as reasonable ones. Inevitably, a sliding scale test of general reasonableness will become the touchstone of the fourth amendment.

Indeed, the good faith exception, coupled with the operation of other forces, works to ensure this outcome. To begin with, the good faith exception's factual mistake facet is intelligible only as a test of general reasonableness,[481] and its technical violations facet will stem the development of fourth amendment doctrine.[482] What rules we now have will slowly atrophy, and new ones will not be generated to take their place. Moreover, trial judges are averse to suppressing probative evidence, and an excuse of general reasonableness provides a virtually unreviewable way to avoid doing so. We can expect, then, to find judges' thumbs on the reasonableness side of any sliding scale.[483] Even a judge sensitive to fourth amendment interests will find himself in difficult straits, for as Professor Amsterdam has observed, the difficulty with a reasonableness test is that "it converts the fourth amendment into one immense Rorschach blot. . . . The varieties of police behavior and the occasions that call it forth are so innumerable that their reflections in a general sliding scale approach could only produce more slide than scale."[484] In practice, he concludes, "appellate courts defer to trial courts, and trial courts defer to the police."[485] Thus, "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."[486]

2. The Appeal

For the most part, trial courts simply apply the law within the bounds set by appellate courts. Appellate courts, however, both correct errors of law and develop the law. As a result, the consequences of the good faith exception are even more profound at the appellate level because courts that adopt the exception will not develop fourth amendment law. If evidence is admissible under the good faith exception, appellate decisions that resolve the fourth amend-

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480 Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., with Harlan & Stewart, JJ., dissenting from dismissal of certiorari) (inquiry into minds of officers would produce grave and fruitless misallocation of judicial resources).

481 *See* text accompanying note 326 *supra*.

482 *See* text accompanying note 344 *supra*.

483 "So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute an open invitation to nullification at the trial court level." Kaplan, *supra* note 131, at 1045.

484 Amsterdam, *supra* note 88, at 393-94. Moreover, "[i]t is always easier to convince jurors that a police illegal action was inadvertent than it is to convince them it was purposeful." Kaplan, *supra* note 131, at 1045 n.93 (citing R. KEETON, TRIAL TACTICS AND METHODS 291-92 (2d ed. 1973)).

485 Amsterdam, *supra* note 88, at 394.

486 Beck v. Ohio, 379 U.S. 89, 97 (1964), *quoted in* Amsterdam, *supra* note 88, at 394.

ment issue would be superfluous. To be sure, in some instances under the good faith exception, a court will have to consider what present law required of an officer in order to determine whether his behavior was reasonable.[487] Nevertheless, the issue under the good faith exception is how far the officer's conduct exceeded the limits of existing law. Thus, there would be no occasion to re-examine the limits themselves in the course of determining the officer's reasonableness.[488]

Moreover, the judicial policy against rendering advisory opinions ensures that courts will not examine police conduct held permissible under prior decisions or authorized by statutes because such actions undoubtedly would constitute good faith reasonable conduct. Appellate courts will not issue advisory opinions; the Supreme Court warned against such unnecessary adjudication in *Bowen v. United States*.[489] In *Bowen*, the Ninth Circuit had refused to apply *Almeida-Sanchez v. United States*[490] retroactively.[491] Before deciding the retroactivity issue, however, the Ninth Circuit concluded that the search was illegal. Affirming the decision that *Almeida-Sanchez* should not be applied retroactively, the Supreme Court nevertheless warned:

> This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive . . . . This practice is rooted in our reluctance to decide constitutional questions unnecessarily . . . . Because this reluctance is in turn grounded in the constitutional role of the federal courts . . . the district courts and courts of appeal should follow our practice, when issues of both retroactivity and application of constitutional doctrine are raised, of deciding the retroactivity issue first.[492]

Bowen suggests a similar approach in good faith exception cases. The good faith exception would allow appellate courts to decide that a police officer's reasonable reliance on prior law obviated the need to reach the constitutional question, because the exclusionary rule would not apply in any event. Thus, applying the rationale of *Bowen*, federal courts adopting a good faith exception would not promulgate decisions addressing the fourth amendment

487. One commentator has asserted that the good faith exception does not preclude examination of the constitutionality of the officers' conduct. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1415 (1977). Under this analysis, appellate courts or the Supreme Court could require trial courts to address fourth amendment issues directly before they evaluate possible good faith exception arguments. *Id.* It is hard to believe that the availability of the good faith exception will result in searching reviews of fourth amendment law, even when courts are required to resolve fourth amendment issues directly before considering good faith exception claims. The good faith exception's implicit message to trial courts and litigants that reasonable fourth amendment violations are permissible means that only the most egregious police conduct would receive close scrutiny under traditional fourth amendment standards, conduct that would have failed the good faith exception standard anyway.

488. The *Williams* court, for example, decided that Agent Markonni had not transgressed the limits of the law enough to merit any discussion of these limits at all.

489. 422 U.S. 916 (1975).

490. 413 U.S. 266 (1973).

491. United States v. Bowen, 500 F.2d 960, 967 (9th Cir. 1974) (search illegal because conducted without warrant or probable cause 49 miles from border; outside scope of *Almeida-Sanchez* permissible border searches), *aff'd on other grounds*, 422 U.S. 916 (1975).

492. 422 U.S. at 920 (citations omitted).

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There are, then, several reasons for believing that the good faith exception will stem the development of fourth amendment law. First, there will be far fewer challenges to arguably illegal searches and seizures. If courts are quick to apply the good faith exception, litigants, recognizing that evidence in their cases will not be suppressed, will stop raising fourth amendment issues. Even if courts ignore or distinguish *Bowen* and issue purely prospective decisions delimiting future permissible police conduct, there will nonetheless be a drop-off in the number of fourth amendment challenges. Defendants want to win their cases, not advance abstract points of law that may benefit others.[494] Thus, regardless of the merits of a defendant's constitutional claim, he will have no incentive to challenge prior decisions if he anticipates that the evidence will be admitted under the good faith exception.[495] Judicial sensitivity

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493. In *Bowen*, the petitioner had been the subject of a routine search at a fixed traffic check point some distance from the Mexican border. Evidence leading to a criminal prosecution was uncovered in the course of the search. Bowen's motion to suppress was denied by the trial court, and the Ninth Circuit affirmed that decision. United States v. Bowen, 462 F.2d 347, 348 (9th Cir. 1972) (per curiam). The Supreme Court granted *certiorari*, but vacated and remanded the case for consideration in light of its decision in *Almeida-Sanchez v. United States*, which held that non-probable cause searches conducted by roving border patrols were unconstitutional. Bowen v. United States, 413 U.S. 915, 916 (1973). On remand, Bowen asked the Ninth Circuit to extend the reasoning of *Almeida-Sanchez* to invalidate fixed check point searches as well. United States v. Bowen, 500 F.2d 960, 962 (9th Cir. 1974) (en banc). The Ninth Circuit agreed that *Almeida-Sanchez* governed such searches, but ruled that it should not be applied retroactively, and therefore upheld the admission of the evidence against Bowen. *Id.*

The Supreme Court again granted *certiorari*. Before the Court, Bowen made the imaginative argument that because his case involved an extension, not merely an application, of *Almeida-Sanchez*, the newly announced law should have been applied in his case even if *Almeida-Sanchez* was non-retroactive. Bowen v. United States, 422 U.S. 916, 919-20 (1975). He argued that he was entitled to exclusion under the Court's uniform practice of "applying new constitutional doctrine in the case that establishes the point." *Id.* at 920. The Court rejected this argument, and noted that the Ninth Circuit should not even have decided Bowen's constitutional claims. *Id.*

It is true that in the *Bowen* situation, another case testing the constitutionality of fixed point searches would, doubtless, eventually arise if the Border Patrol continued to conduct such searches. As it turned out, the Court decided such a case on the very same day as *Bowen*, declaring that a fixed point search that occurred after *Almeida-Sanchez* was unconstitutional. United States v. Ortiz, 422 U.S. 891, 896-97 (1975). Thus, the Supreme Court's directive in *Bowen* that courts decide whether a particular decision should be given retroactive effect before addressing a novel constitutional claim building on that decision, does not tend to foreclose ultimate resolution of the novel claim in the way that the good faith exception does. Consequently, the Court could rule that even when misconduct would be excused under the good faith exception, the fourth amendment question should be resolved in an advisory opinion. There is nothing in *Bowen*, however, to suggest that the Court would reach such a result. Moreover, even in the *Bowen* situation, by ruling as it did, the Court might have permitted a highly intrusive and, as it turned out, unconstitutional practice to continue for the indefinite future. Indeed, the irony is that the more unreasonable it was in terms of fruitfulness, the longer it was likely to continue.

494. The argument may be made that advances in fourth amendment law will come through the litigative strategies of institutional defenders, such as public defender services. This is unlikely for several reasons. First, any single new development in fourth amendment law is likely to require the litigation of a large number of cases that present that issue. This would far exceed the pool of cases available to any one attorney or office. Second, public defenders are notoriously overworked and do not have time to plan the development of fourth amendment law or to litigate every marginal case raising a key point of law in the hope of ultimately changing the law. Third, personnel changes and turn-over would make the execution of any such strategy difficult at best. Finally, changes in fourth amendment law do not have the kind of effect on the professional life of defense lawyers that, for example, liberalized discovery rules have.

495. One commentator has noted that:

> [I]f parties anticipate such a [purely prospective decision] they will have no stimulus to argue for change in the law. Indeed, the recognition of even a substantial possibility of such limita-

to this chilling effect is, of course, the primary reason why decisions that are not given retroactive effect are applied to the litigants whose cases have spawned them.[496] Nevertheless, the very purpose of the technical violations facet of the good faith exception is to ensure that evidence is not suppressed when there has been reliance on prior law. Thus, when a good faith exception is operative, a defendant whose argument for suppression would require the court to overrule, modify, or even merely clarify existing law would have little or no chance for success.

Second, in the cases that do come up, courts will not decide the fourth amendment issue frequently enough to advance fourth amendment law very significantly over time.[497] The good faith exception rests on the premise that fourth amendment violations are acceptable if reasonable. Under this rationale, the courts will categorize only egregious police conduct as violative of the fourth amendment. Courts will most readily find good faith exceptions in close cases, those from which advances in fourth amendment law now come. If the conduct is so close to the line that a judge cannot confidently characterize it as proper or improper, the good faith exception allows the judge to conclude that an officer should not be required to do so either. Thus, we will have few meaningful new decisions refining fourth amendment law.

Third, the good faith exception will have a stultifying effect on the develop-

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tion will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases. Under such circumstances issues involving renovation of unsound or outmoded legal doctrines will either not be presented for judicial decision or—what may be even more troublesome—if reached by the courts, may be decided upon inadequate argument and consideration.

Mishkin, *Forward: The High Court, The Great Writ, and the Due Process of Law and Time*, 79 HARV. L. REV. 56, 61 (1965).

496. In Stovall v. Denno, 388 U.S. 293 (1967), the Supreme Court refused to apply to one case a rule of law established in two similar cases that the Court decided the same day. Distinguishing between *Stovall*, a habeas corpus collateral challenge, and the two other cases, direct appeals, the Court called *Stovall* a "vehicle" for deciding whether there would be retroactive application of the two direct appeals. *Id.* at 294. Rejecting retroactivity, the Court said:

> We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

Id. at 301.

497. It is essential for an appellate court to receive many cases in order to clarify a particular area of the law. Otherwise, "the bits or slices or splinters which are cast up may be too fragmentary to yield a proper picture or to allow the shaping and joining of complementary hubs and spokes and rims to form a doctrinal wheel." K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 263 (1960). With a continuing set of cases, "the court will see more, learn more from the series; the court will begin to see in the round rather than the flat, and to gain some understanding of the whole in action." *Id.* This may seem to suggest praise for the disease because of the virtues of the remedy applied to it—that repeated fourth amendment violations are desirable because of the exclusionary rule case law that they generate. The problem of police lawlessness, however, is more a condition than a disease, and the ongoing interpretation of the fourth amendment a perpetual societal necessity.

ment of fourth amendment law, as courts adopting it fail to set standards for future police conduct. The second majority opinion in *Williams* itself demonstrates that courts are likely to find good faith exceptions without examining or defining the limits of the law.[498] Under the *Williams* analysis, another officer might well be able to arrest and search a suspect for bond-jumping without fearing suppression of the evidence he obtains. Only after courts discuss the limits of the law will officers be barred from claiming good faith if they engage in the same conduct in another case.

Further, the incentive to develop fourth amendment law under the good faith exception will rest primarily with the government. Every victory for the government in the courtroom will widen the boundaries of lawful police conduct. Since the determination of the fourth amendment issue will not help the defendant who raises it, it will be uneconomical for him to devote already limited resources to contesting this issue. Thus, the fourth amendment argument would be severely lopsided: the government devoting substantial resources, the defendant, comparatively few. Like a ratchet, the law will move in only one direction.[499]

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498. *See* note 353 *supra* (discussing *Richmond v. Commonwealth* and effects of adopting good faith exception).

499. One commentator has recently argued that the good faith exception would have just the opposite effect. He contends that such an exception would would lead courts to interpret the fourth amendment more liberally, that is, as imposing tighter restrictions on the police. Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DEPAUL L. REV. 51 (1980). Bernardi cogently criticizes a series of recent Supreme Court decisions that he suggests have unduly restricted fourth amendment protections. These cases, he argues, might well have been decided differently had there been a good faith exception to the exclusionary rule. Bernardi describes, for example, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), where the Court held that waiver of the right to refuse consent to a search must be knowingly made, as being a case where "the Court has charted a course restricting individuals' protections under the fourth amendment for the sake of avoiding the exclusionary rule." Bernardi, *supra*, at 93. The idea seems to be that if the Court could avoid suppressing evidence when police misconduct has been undertaken in good faith, it would be prepared to pronounce stricter fourth amendment standards.

It is conceivable that if there were no exclusionary rule at all, the Court would be prepared to issue grand, hortatory, liberal, fourth amendment rulings. The only problem is, of course, that without the rule there would be no occasion to issue these rulings, and no effective sanction to enforce them. It makes no sense at all to argue that with a good faith exception the courts would make more liberal fourth amendment law. To begin with, it is clear that the Supreme Court decided *Schneckloth*, and the other cases Bernardi discusses, because it approved what the police had done and not because it simply wanted to avoid suppressing evidence. As the Court said in *Schneckloth*, "where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." 412 U.S. at 227. The Court did not decline to require the police to inform citizens of their right to refuse consent because it feared it would have to suppress evidence where the police bungled, but rather because it felt it would be "impractical" to impose such a requirement. *Id.* at 231.

Moreover, the good faith exception would not, in fact, enable the courts to avoid applying the exclusionary rule in situations such as *Schneckloth*. Once the Court held, as Bernardi suggests it would have, that the police must obtain a knowing as well as voluntary waiver for a consent to search, it would not thereafter be a reasonable good faith mistake to neglect to do so, and evidence would be suppressed. The only effect of the good faith exception would have been to permit the Supreme Court to rule that knowing consent must henceforth be demonstrated, while at the same time allowing Bustamonte's fraud conviction to stand because the police there could not reasonably have known what was expected of them. Bernardi's argument, then, requires us to believe that the Court declined to render a correct constitutional ruling of great importance because it could not bear to free Robert Bustamonte on his bad check charge. Even the Court's harshest critics do not think it quite that short sighted. Finally, Bernardi overlooks that under a good faith exception cases like *Schneckloth* might well not be litigated at all, and so the Court would not have the opportunity to make the liberal fourth amendment law that Bernardi favors.

B. THE GOOD FAITH EXCEPTION AND THE FOURTH AMENDMENT

The good faith exception, then, will promote a general reasonableness standard for fourth amendment violations and stem the development of fourth amendment law. This will itself increase the number of fourth amendment violations that could be prevented if the courts stayed in the business of identifying the lines that separate lawful from unlawful searches and seizures. The good faith exception will affect police conduct in other ways as well. Most fundamentally, as they perceive that courts are often ready to excuse their violations of constitutional norms, the norms themselves will lose the symbolic significance we want the police to attach to them. As the police come to know these norms as only inconsistently binding on them, the educative and moral force of the norms will be weakened. Yet modern deterrence theory emphasizes the importance of this often overlooked educative function of law.[500] The good faith exception will also have more direct effects on police conduct. This section examines three typical situations in which the exclusionary rule currently applies, and in which a good faith exception may produce a different result.

1. Searches and Seizures Conducted Without Probable Cause

Under existing law, probable cause is the basic requirement for most searches and seizures. The fruits of a search or seizure that was illegal because made without probable cause are suppressed. This is the most straightforward kind of suppression case, and perhaps also the most common. Conceivably, a court adopting a good faith exception would decide that because reasonableness is already built into the concept of probable cause, the exception simply does not apply in this case; the court might rule that a "reasonable" belief that probable cause was present, when it was not, is a logical impossibility because probable cause means "reasonable grounds for belief." Thus, to recognize the possibility of a "reasonable mistake" as to probable cause would be to acknowledge the possibility of an officer acting out of a "reasonable unreasonable belief."

The *Williams* decision, however, suggests no such limitation on its holding. Indeed, the court relied on Professor Ball's article, which argued for a weakened exclusionary rule principally in order to dilute the concept of probable cause.[501] Thus, it seems likely, although not inevitable, that the good faith exception will apply in this sort of case.

How, then, will the *Williams* decison affect these searches? The most obvious and baleful consequence will be to retard, if not halt altogether, the development of standards for assessing probable cause. This article has discussed how the courts, in implementing the exclusionary rule, have been able to set tolerably clear lines for the police to observe in determining the presence of probable cause in many recurring factual patterns.[502] Yet it takes close

500. *See generally* F. ZIMRING & G. HAWKINS, *supra* note 138.

501. *See* Ball, *supra* note 311, at 656 (requirements of good faith exception replace requirement of probable cause as determinitive test for admissibility of evidence).

502. *See* notes 185-94 *supra* and accompanying text (discussing District of Columbia Court of Appeals decisions).

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503. *See* notes 197-200

cases—those in which a court could say that an officer's conduct was "reasonable" even if it was illegal—for the line to be identified. Consequently, this important law development process will likely come to a halt.

The benefit in protection of fourth amendment values reaped from appellate decisions in cases like those mentioned above would clearly seem to outweigh the social cost of the few prosecutions that were lost. Moreover, even when a court has denied a motion to suppress and held the evidence admissible, the court may have further clarified probable cause standards in the process.[503] Thus, on the balance of values inherent in the probable cause standard, suppression of evidence is entirely justified when police conduct violates the fourth amendment.

It also stands to reason that a police officer will himself be less exacting when making assessments of probable cause if he knows that his conduct will later be measured against a tolerant standard that allows for "reasonable good faith mistakes." The rational officer, after *Williams*, will search in the doubtful case, where before *Williams*, he would likely have stayed his hand. In Professor Ball's view, this is precisely the point. Moreover, the simultaneous weakening of the exclusionary rule's general deterrent impact, and the undermining of its usefulness in the law development process will combine to reduce the rule's potential for preventing fourth amendment violations. As noted above, the officer will be motivated to search in the doubtful case. At the same time, this doubtful case will remain doubtful indefinitely, since the courts will lack the steady flow of cases that require them to sharpen the bounds of permissible police conduct.

2. Warrantless Arrests and Searches

A second sort of fourth amendment violation occurs when the police fail to obtain a warrant when one is required. This article has suggested that the efficiency of the exclusionary rule is potentially great in this situation. If the police know that by failing to obtain a warrant, they will risk suppression of the evidence, they will obtain a warrant in doubtful cases. They will still be able to obtain the evidence they seek, and they can minimize the risk that a judge will later order it suppressed. Consequently, the exclusionary rule serves its purpose, although very little evidence is in fact excluded. Extending the hope that the trial judge will later excuse a failure to obtain the necessary warrant as a "good faith reasonable mistake" can only encourage the police to proceed without a warrant when they are unsure whether they need one or not. Thus, searches will occur in the absence of probable cause, although the magistrate, had he been consulted, could have told the police that they simply could not search, at least without first continuing their investigation by other means. This in turn will increase the number of innocent victims of ultimately fruitless police intrusions. Further, without a steady diet of close cases on the scope of the warrant requirement, the bounds of that standard will remain unclear.

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503. *See* notes 197-200 *supra* and accompanying text (discussing *Dorman v. United States*).

3. Searches Pursuant to an Invalid Warrant

Finally, there are those cases when a defendant seeks to attack a magistrate's finding of probable cause upon which a warrant was issued. Although the *Williams* court expressly reserved the question whether its new rule would apply here, the logic of the decision can leave little doubt that it would be applicable.[504] Indeed, the proponents of legislation enacting a similar limitation on the exclusionary rule have cited this situation as a principal justification for their proposals. Yet the principal concern of the drafters of the fourth amendment was to prohibit issuance of warrants without probable cause.[505] The anomaly of excluding the exclusionary rule in precisely those situations where the fourth amendment violation is clearest seems to have escaped attention. The view that the exclusionary rule is pointless here is tragically short-sighted. Courts rarely suppress evidence by overruling a magistrate's finding of probable cause. There are, for example, no recent decisions from the District of Columbia Court of Appeals, or the United States Court of Appeals for the District of Columbia Circuit, holding a warrant insufficient.[506] The reason surely is an effective system for the issuance of warrants that can, in no small measure, be attributed to the exclusionary rule. The magistrate is surely more careful because he knows that his probable cause determinations may be reviewed on a motion to suppress. Further, he has standards to consult only because the appellate courts have decided enough cases, including some important ones involving review of affidavits in support of warrant applications, to provide guidance. The police, moreover, have less incentive to engage in "magistrate-shopping," in an effort to present their warrant applications to the most lenient magistrate available. At the same time, the exclusionary rule presents the legislature with the incentive to finance a system of professional magistrates, capable of accurate probable cause determinations.[507]

Those few cases where courts have suppressed evidence on the ground that a magistrate issued a warrant in the absence of probable cause have, by and large, served the important purpose of clarifying the law of probable cause. The cases that immediately spring to mind are *Aguilar v. Texas*[508] and *Spinelli v. United States*,[509] which, more than any others, have safeguarded the magis-

504. *See* notes 323-25 *supra* and accompanying text (discussing applicability of *Williams* to cases where officers obtain warrant).

505. *See* note 43 *supra* (discussing intent of drafters of fourth amendment).

506. This article leaves aside those cases in which the affiant has made a knowing or reckless mistatement of a material fact in his warrant application. *See* Franks v. Delaware, 438 U.S. 154, 158 (1978) (affidavit supporting probable cause contained statement of witness never interviewed by police; misstatements not inadvertent, but in bad faith).

507. There is some evidence that in some jurisdictions the police do shop around for lenient magistrates. *See* 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 4.2(e), at 39 (may be reason to be concerned about practice of "magistrate-shopping") (citing L. TIFFANY, D. MCINTYRE & D. ROTTENBERG, DETECTION OF CRIME 120 (1965)). If their decisons were not reviewable by a motion to suppress, those magistrates sympathetic to the police might well become more generous still. Professor Johnson has suggested that in the federal system, at least, the exclusionary rule should not apply when the police have acted pursuant to a warrant. Johnson, New Approaches to Enforcing the Fourth Amendment 8-9 (working paper), *cited in* 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 43, § 1.2 (Supp. 1981). It may well be, however, that the federal magistrates perform as well as they do because the exclusionary sanction, although rarely applied, is an ever-present possibility.

508. 378 U.S. 108 (1964).

509. 393 U.S. 410 (1969).

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