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The Emerging Good Faith Exception to the Exclusionary Rule

The exclusionary rule,¹ which suppresses evidence seized in violation of the fourth amendment,² has been heavily criticized by leading legal authorities.³ Courts and commentators have suggested changes in the exclusionary rule ranging from slight modification⁴ to complete abandonment.⁵ In *United States v. Williams*,⁶ the United

1 The exclusionary rule, as used in this note, refers to the rule that excludes evidence seized in violation of the fourth amendment prohibition against unreasonable searches and seizures.

2 U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

3 Chief Justice Burger of the Supreme Court of the United States has called the rule "poorly designed and [one that has] never really worked." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 424 (1971) (Burger, C.J., dissenting). Referring to the exclusionary rule in 1922, Dean Wigmore lamented that "[our] way of upholding the [fourth amendment] is not to strike at the man who breaks it, but to let off somebody else who broke something else." Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479, 484 (1922). Furthermore, Supreme Court Justice White has noted that, because the rule does not deter unlawful police action, "it [is] a senseless obstacle to arriving at the truth in many criminal trials." *Stone v. Powell*, 428 U.S. 465, 538 (1976) (White, J., dissenting).

4 Proposed modifications of the exclusionary rule include establishing a predominantly civilian commission to adjudicate fourth amendment damages claims against police, Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 17-19 (1964), holding the exclusionary rule applicable only to substantial violations of the fourth amendment and the due process clause, Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & C. 141, 150-59 (1978), creating a good faith exception by which evidence seized wrongfully but in good faith would nevertheless be admissible, Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DE PAUL L. REV. 51 (1980); Note, *Reason and the Fourth Amendment—The Burger Court and The Exclusionary Rule*, 46 FORDHAM L. REV. 139 (1977); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965), judging searches and seizures according to compliance with legislative or police departmental regulations that are subject to judicial review for reasonableness, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 409-39 (1974), applying the exclusionary rule when police departmental regulations, training programs, and disciplinary history indicate a failure to take the fourth amendment seriously, Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1050-55 (1974), applying the exclusionary rule only when the fourth amendment violation has been "substantial," Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1 (1975); MODEL CODE OF PRE-ARREST PROCEDURE § SS 290.2 (Official Draft 1975); 4 CAP. U.L. REV. 95 (1974); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 745 (1972).

5 See, e.g., Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE

States Court of Appeals for the Fifth Circuit adopted a good faith exception as one such change. The court, sitting en banc, held that "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 mistaken, belief that they are authorized."⁷ The *Williams* holding was based on three premises: (1) the fourth amendment and the exclusionary rule are not co-extensive; (2) the exclusionary rule is justified only by its deterrent value; and (3) the United States Constitution does not require the exclusionary rule.⁸

This note examines the good faith exception to the exclusionary rule. Part I reviews the history of the exclusionary rule regarding its constitutional underpinnings; Part II discusses the case law addressing the good faith exception; and Part III analyzes the issues involved in a decision whether to adopt the good faith exception.

I. The Exclusionary Rule: Constitutional Background

The first step in any discussion concerning the exclusionary rule is resolving whether the United States Constitution requires the rule. Certain legal scholars have, contrary to the decisions of the Supreme Court of the United States, proposed two independent constitutional bases for the exclusionary rule.⁹ The first arises from the fourth amendment;¹⁰ the second arises from a due process right.¹¹ However, both constitutional bases are grounded in the concept of judicial integrity; that is, courts should refuse to convict a person by using illegally seized evidence.

If the Constitution requires the suppression of all illegally seized evidence, then evidence seized illegally is constitutionally inadmissible, good faith notwithstanding. However, if the exclusionary rule is merely a judicially-created remedy, then a good faith exception is a

215, 231-32 (1978) (suggesting courts should hold a separate trial of the police, after the defendant's trial, in which police officers' fourth amendment violations are adjudicated and sanctioned); Note, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 KAN. L. REV. 768 (1972); Note, 4 SW. U.L. REV. 68 (1972); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573 (1971).

6 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 946 (1981).

7 *Id.* at 840.

8 *Id.* at 840-41.

9 See Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 379 (1979).

10 *Id.* at 373.

11 *Id.*

permissible modification of that remedy.¹² Good faith considerations aside, the Supreme Court cannot require state courts to suppress illegally seized evidence if the Constitution does not require the exclusionary rule. Thus, the states would be free to experiment with other methods of enforcing the fourth amendment.¹³

Early Supreme Court decisions did not clearly indicate whether the exclusionary rule arose out of the Constitution. In *Boyd v. United States*,¹⁴ the Court held that requiring the defendant to produce certain papers was an invasion of his "indefeasible right of personal security, personal liberty and private property,"¹⁵ and thus was an unreasonable seizure violating the fourth amendment. Thus, the exclusionary rule was first grounded in rights to property and privacy.¹⁶ Similarly, in *Weeks v. United States*,¹⁷ holding the exclusionary rule applicable to all federal courts,¹⁸ the Court did not declare expressly that the rule was constitutionally required. The Court stated that judicial and law enforcement efforts to convict the guilty "are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."¹⁹ However, that language means that the fourth amendment must be more than an "empty blessing,"²⁰ and not that the exclusionary rule cannot exist apart from the Constitution.²¹

The Court in *Weeks* noted two exclusionary rule rationales: privacy²² and judicial integrity.²³ In expressing the judicial integrity

12 See Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & C. 635, 651 (1978). But see Sunderland, *supra* note 4. See generally Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

13 Justice Harlan urged that the Court should encourage states to experiment with fourth amendment enforcement. See *Mapp v. Ohio*, 367 U.S. 643, 681 (1961) (Harlan, J., dissenting) ("this Court should continue to forbear from fettering the states with an adamant [exclusionary] rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement").

14 116 U.S. 616 (1886).

15 *Id.* at 630.

16 For a discourse on returning to the property rationale for the fourth amendment, see Schlesinger & Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225 (1980).

17 232 U.S. 383 (1914).

18 *Id.* at 398.

19 *Id.* at 393.

20 See Kamisar, *The Exclusionary Rule In Historical Perspective: The Struggle to Make the Fourth Amendment More Than an Empty Blessing*, 62 JUDICATURE 337 (1979).

21 *Contra*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

22 232 U.S. at 391, quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of his

rationale for the first time, the Court stated that evidence seized in violation of the fourth amendment "should find no sanction in the courts" charged with upholding constitutional rights.²⁴ In *Olmstead v. United States*,²⁵ Justice Brandeis refined the judicial integrity rationale:

If the government becomes a lawbreaker, it breeds contempt for the 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 crime in order to secure the conviction of a private criminal—would bring terrible retribution.²⁶

Judicial integrity thus demands that federal courts exclude illegally seized evidence to avoid demonstrating "a manifest neglect if not an open defiance of the prohibitions of the Constitution."²⁷

The next phase of Supreme Court search and seizure decisions dealt with the exclusionary rule's use in state courts. In *Wolf v. Colorado*,²⁸ decided in 1949, the Court held that, although the fourteenth amendment due process clause prohibits unreasonable searches and seizures by state police officers, it does not require state courts to apply the federal courts' exclusionary rule.²⁹

In 1960, however, the Court in *Elkins v. United States*³⁰ reaffirmed *Wolf's* concern for federalism by invalidating the "silver platter doctrine," which allowed a federal criminal trial to use evidence seized illegally by state police officers.³¹ The Court cited deterrence and

offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property").

23 232 U.S. at 392. The Court emphasized that

[t]he 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 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

Id.

24 *Id.*

25 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

26 *Id.* at 485. The Court continues to mention the judicial integrity rationale in its exclusionary rule decisions. *See, e.g.*, *United States v. Janis*, 428 U.S. 433, 458-59 n.35 (1976); *Brown v. Illinois*, 422 U.S. 590, 599 (1975); *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

27 232 U.S. at 392.

28 338 U.S. 25 (1949).

29 *Id.* at 33.

30 364 U.S. 206 (1960).

31 *Id.* at 223.

judicial integrity as exclusionary rule rationales,³² and emphasized the rule's nonconstitutional nature in stating that the *Elkins* decision did not affect "the freedom of the states to develop and apply their own sanctions in their own way."³³

Justice Frankfurter, however, argued in dissent that under the Court's opinion in *Elkins* the states were no longer free to choose their remedies. Pointing to several disparate fourth amendment decisions,³⁴ he maintained that the majority opinion meant that "fluctuating and uncertain views of what constitutes an 'unreasonable search' under the Fourth Amendment in conduct by federal officials, are to determine whether what is done by state police, *wholly beyond federal supervision*, violates the Due Process Clause."³⁵ Thus, the real issue before the Court, according to Justice Frankfurter, was the Court's wisdom in applying federal fourth amendment standards to strictly state-controlled police behavior. Justice Frankfurter argued further that the *Weeks* exclusionary rule was a "court-developed rule" applying only to federal officers, and that the *Weeks* opinion found it "[un]necessary to say whether or not the rule of conduct flows directly from the Constitution."³⁶ Justice Frankfurter concluded that, since the *Weeks* rule was an "evidentiary criterion unencumbered with weighty constitutional distinctions,"³⁷ the Court could not judge state-seized evidence by federal standards.

The constitutional impact of *Elkins* diminished when the Court decided *Mapp v. Ohio*³⁸ in 1961. In *Mapp*, the Court sought to cement the exclusionary rule in a constitutional foundation by holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state

32 *Id.* at 217, 222-23.

33 *Id.* at 221. The Court underscored the distinction between its supervision of federal courts and any interference with state court operations in declaring:

In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

Id. at 223-24.

34 *See* *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Trupiano v. United States*, 334 U.S. 699 (1948); *Harris v. United States*, 331 U.S. 145 (1947); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Co. v. United States*, 282 U.S. 344 (1931); *Marron v. United States*, 275 U.S. 192 (1927).

35 364 U.S. at 239 (Frankfurter, J., dissenting) (emphasis added).

36 *Id.* at 244 (Frankfurter, J., dissenting).

37 *Id.*

38 367 U.S. 643 (1961).

court.”³⁹ In overturning its statement in *Elkins* that states were free to develop their own fourth amendment sanctions,⁴⁰ the Court somewhat surprisingly stated that “the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of Constitutional origin, remains entirely undisturbed.”⁴¹

Regardless of the Court’s language in *Mapp*, the exclusionary rule’s rationale since 1961 has been deterrence.⁴² In *Linkletter v. Walker*,⁴³ the Court refused to apply *Mapp* retroactively because of a lack of deterrent effect.⁴⁴ Justice Clark, who also authored *Mapp*, noted in *Linkletter* that exclusionary rule cases since *Wolf*⁴⁵ uniformly emphasized the need to deter illegal police action.⁴⁶ The Court in *Calandra v. United States*⁴⁷ strongly emphasized deterrence in holding that a grand jury witness may not refuse to answer questions based

39 *Id.* at 655.

40 See text accompanying note 33 *supra*. Only four justices agreed that the fourth amendment constitutionally requires the exclusionary rule. Justice Black concurred in the result, stating that the fourth and fifth amendments together require the exclusionary rule. 367 U.S. at 661-62 (Black, J., concurring).

41 *Id.* at 649. *Weeks* and *Wolf*, contrary to the Court’s bold statement, did not “plain[ly] and unequivocal[ly]” state that the *Weeks* exclusionary rule was of constitutional origin. The Court in *Weeks* emphasized that “[t]o sanction such proceedings [tainted with fourth amendment violations] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.” 232 U.S. at 394. The language of *Weeks* supports a judicial integrity rationale for the exclusionary rule, but does not indicate a constitutional foundation for it. Rather, the purpose of *Weeks* and *Wolf* was to provide some substance to the fourth amendment’s prohibitions. Both *Weeks* and *Wolf* held that the exclusionary rule did not apply to the states, emphasizing the rule’s nonconstitutionality.

42 The deterrence rationale first appeared in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (“[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all”), and was emphasized by the Court in *Elkins*, 364 U.S. at 217 (“[the exclusionary rule’s] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it”).

43 381 U.S. 618 (1965).

44 The Court in *Linkletter* rejected the general constitutional law theory that constitutional decisions must be retroactive. The Court stated that “the Constitution neither prohibits nor requires retrospective effect.” *Id.* at 629. The retroactivity question is thus a policy matter that courts must resolve anew with each case, and a holding of nonretroactivity indicates neither a constitutional nor a nonconstitutional decision. See generally *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-07 (1971); *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

45 338 U.S. 25 (1949).

46 381 U.S. at 636-37. Justice Clark’s statement “effectively put an end to the short-lived attempt to ground the exclusionary rule in a ‘logically and constitutionally necessary’ deduction from a fourth amendment ‘right to privacy.’” Schlesinger & Wilson, *supra* note 16, at 237.

47 414 U.S. 338 (1974).

on illegally seized evidence.⁴⁸ The majority stated that applying the exclusionary rule to the grand jury context "would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation."⁴⁹ The inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim substantially negates any incentive to disregard the fourth amendment.⁵⁰ Thus, the Court in *Calandra* concluded that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."⁵¹ Because the Supreme Court has retained the *Calandra* interpretation of the exclusionary rule as primarily a deterrent,⁵² the Court has substantially resolved the rule's constitutional uncertainty, thus crumbling that constitutional foundation so carefully laid in *Mapp*.

II. The Exclusionary Rule: Emergence of a Good Faith Exception

Due to the uncertainty of the exclusionary rule's constitutional foundation, serious discussion of a good faith exception did not begin until the 1970's.⁵³ Since *Calandra* and its progeny,⁵⁴ four Supreme

48 *Id.* at 349-54.

49 *Id.* at 351.

50 *Id.*

51 *Id.* at 348.

52 See *Michigan v. DeFillippo*, 443 U.S. 31, 38 n.3 (1979) ("[t]he purpose of the exclusionary rule is to deter unlawful police action"); *United States v. Ceccolini*, 435 U.S. 268, 280 (1978) ("the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer"); *Stone v. Powell*, 428 U.S. 465, 486 (1976) ("[t]he primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights"); *United States v. Janis*, 428 U.S. 433, 446 (1976) ("the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct'"); *United States v. Peltier*, 422 U.S. 531, 536 (1975) ("the Court has relied principally upon the deterrent purpose served by the exclusionary rule"); *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) ("the exclusionary rule's 'prime purpose is to deter future unlawful police conduct'"). Accord, *United States v. Ajlouny*, 629 F.2d 830, 840 (2d Cir. 1980) ("the primary, if not the sole, justification for the exclusionary rule is the deterrence of police conduct that violates Fourth Amendment rights"); *United States v. Williams*, 622 F.2d 830, 841-42 (5th Cir. 1980) ("[t]he exclusionary rule . . . is a judge-made rule . . . justified in the illegal search context only by its deterrence of future police misconduct"), *cert. denied*, 101 S. Ct. 946 (1981).

53 Professor Ball states three reasons for the lack of attention given to the good faith exception until the 1970's. One, the Court considered only whether subjective good faith alone was enough to constitute probable cause. The Court soundly rejected mere subjectivity in *Beck v. Ohio*, 379 U.S. 89 (1965). Two, the Court was not ready to curtail the exclusionary rule's scope until its membership shifted in the early 1970's. Three, until *Calandra*'s renewed emphasis on deterrence, great uncertainty existed concerning the possible constitutional underpinnings of the exclusionary rule. Ball, *supra* note 12, at 649-50.

Court justices have expressed an intent to modify the exclusionary rule by adopting a good faith exception.⁵⁵ Numerous legal commentators in the past decade have also called for a good faith exception,⁵⁶ which the Fifth Circuit has adopted.⁵⁷

A. *The Supreme Court*

Chief Justice Burger, dissenting in *Bivens v. Six Unknown Named Agents*,⁵⁸ stated that the pressures on police to prevent crime result in "inadvertent errors of judgment" that work no grave injustice.⁵⁹ The Chief Justice expressed concern that the exclusionary rule treats honest mistakes and flagrant fourth amendment violations equally. Burger urged that judicial responses should vary with the flagrancy of the fourth amendment violation at issue.⁶⁰

The inevitability of honest mistakes in police investigations also played a role in *Michigan v. Tucker*.⁶¹ In *Tucker*, a pre-*Miranda v. Arizona*⁶² decision, police officers questioned the defendant after giving him all but one of the *Miranda* warnings. The defendant's statement led to his conviction; he later sought post-*Miranda* habeas corpus relief. Justice Rehnquist, speaking for the Court, denied relief and declared that technical police error did not require the exclusionary rule's application in a fifth amendment context, unless the exclusion of evidence served the rule's deterrence rationale.⁶³ Because the police officers in *Tucker* acted in good faith and without knowledge of

54 See note 52 *supra*.

55 The four justices are Chief Justice Burger, *Stone v. Powell*, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring); Justice White, *id.* at 538 (White, J., dissenting); Justice Powell, *Brown v. Illinois*, 422 U.S. 590, 610-12 (1975) (Powell, J., concurring); and Justice Rehnquist, *United States v. Peltier*, 422 U.S. 531, 537-39 (1975), and *Michigan v. Tucker*, 417 U.S. 433, 446-47 (1974).

56 See note 4 *supra*; Ball, *supra* note 12.

57 See *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 946 (1981), and text accompanying note 94 *infra*.

58 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting).

59 *Id.* at 418.

60 Chief Justice Burger also urged the formation of a predominantly civilian tribunal to adjudicate fourth amendment claims against police. All evidence, regardless of the circumstances under which police officers seized it, would be admissible. Although the Chief Justice did not expressly advocate a good faith exception, he did criticize the lack of distinction between honest mistakes and flagrant violations. This criticism lies at the heart of a good faith exception. *Accord*, Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 13 n.42 (1964).

61 417 U.S. 433 (1974). *Tucker* was a fifth amendment case, but nevertheless contributed significantly to the development of a technical violation good faith exception.

62 384 U.S. 436 (1966).

63 417 U.S. at 447.

the subsequent *Miranda* decision, exclusion of the evidence 'seized would work no deterrence. The Court concluded that

[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.⁶⁴

*United States v. Peltier*⁶⁵ involved a border search that occurred before the Court's decision in *United States v. Almeida-Sanchez*.⁶⁶ The search did not meet the *Almeida-Sanchez* standards. The police officers had complied, however, with the federal statutes, administrative regulations, and judicial precedent in force when the search occurred. The Court, speaking through Justice Rehnquist, held that *Almeida-Sanchez* would not be applied retroactively to the search in *Peltier* because such application would not serve the exclusionary rule's rationales.⁶⁷ Relying on *Tucker*, the Court stated that improper police action, taken in good faith reliance on current standards, would not be deterred by the exclusion of evidence. Therefore, the evidence should be admitted, even though the police officers violated the defendant's fourth amendment rights. The Court emphasized that the judicial integrity rationale would not be affected by the admission of evidence seized illegally but in good faith.⁶⁸

64 *Id.*

65 422 U.S. 531 (1975).

66 413 U.S. 226 (1973).

67 422 U.S. at 542.

68 *Id.* at 537-38. The Court in *Peltier* expressed its attitude on the judicial integrity issue in stating:

[I]f the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. It would seem to follow . . . that the "imperative of judicial integrity" is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of that type engaged in by the law enforcement officials is not permitted by the Constitution.

Id.

Judge Wilkey not only agrees that evidence seized illegally but in good faith is admissible under a judicial integrity rationale, but urges further that "the exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system." Wilkey, *supra* note 5, at 223. *Accord*, 1977 WASH. U.L.Q. 127, 138-39.

In *Brown v. Illinois*,⁶⁹ Justice Powell used a flagrant factual situation to employ Chief Justice Burger's policy⁷⁰ of differentiating between various types of fourth amendment violations based on the nature of the taint.⁷¹ Justice Powell stated that the degree of attenuation necessary to remove the taint should be greater when a "flagrantly abusive violation of Fourth Amendment rights" occurs, and lesser when a "technical" fourth amendment violation occurs.⁷² Citing *Tucker's* willful-negligent premise,⁷³ Justice Powell noted that the deterrence rationale would not be served where the fourth amendment violations are "technical" rather than "flagrantly abusive." In such cases, "no legitimate justification for depriving the prosecution of reliable and probative evidence" exists.⁷⁴

Although Justice Blackmun has espoused no express intent to support a good faith exception, his majority opinion in *United States v. Janis*⁷⁵ has contributed to its development. In *Janis*, the Court held

69 422 U.S. 590 (1975). In *Brown*, police officers arrested the defendant without probable cause and without a warrant, gave the defendant *Miranda* warnings, and received from the defendant inculpatory statements. The Court reversed the conviction, holding that the *Miranda* warnings did not break the chain between the illegal arrest and the inculpatory statements.

70 See text accompanying notes 58-60 *supra*.

71 422 U.S. at 609 (Powell, J., concurring).

The Government has several defenses to allegations of tainted evidence. One, that police officers did not obtain the evidence as a result of the illegal search or seizure, but from an independent source. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). Two, that the causal connection between the illegal conduct and the evidence is so attenuated as to dissipate the taint. See *Wong Sun v. United States*, 371 U.S. 471, 487 (1963). Three, that the admission of tainted evidence was harmless beyond a reasonable doubt. See 1 W. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* § 3.3 (1980); 1 B. GEORGE, *CRIMINAL PROCEDURE SOURCEBOOK* 274-75 (1976).

Justice Powell sought in *Brown* to add a fourth defense: "the point at which the taint can be said to have dissipated should be related, in the absence of other controlling circumstances, to the nature of that taint." 422 U.S. at 609 (Powell, J., concurring).

72 422 U.S. at 610 (Powell, J., concurring).

73 See *Michigan v. Tucker*, 417 U.S. 433 (1974), in which the Court stated:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Id. at 447.

74 422 U.S. at 612 (Powell, J., concurring). Because Justice Powell states that deterrence is the only "legitimate justification" for excluding illegally seized evidence, he evidently rejects any constitutional foundation for the exclusionary rule.

75 428 U.S. 433 (1976). In *Janis*, Los Angeles police officers obtained a search warrant based on a defective affidavit, and subsequently seized cash and wagering records from the defendant. A police officer reported the defendant's wagering income to the Internal Revenue Service, which asserted a deficiency against the defendant. The Court agreed that the police officers illegally seized the evidence, which was therefore inadmissible in the state pros-

that evidence seized by a state police officer in good faith reliance on a warrant that a court later declares defective is admissible in a federal tax proceeding. Since the illegally seized evidence is already inadmissible in state and federal criminal trials, any deterrence added by excluding the evidence in a civil proceeding is marginal and "does not outweigh the cost to society" of excluding reliable evidence.⁷⁶ The Court also noted the police officers' good faith, "a factor that the Court has recognized reduces significantly the potential deterrent effect of exclusion."⁷⁷

The major contribution to the good faith exception's development, however, was Justice White's dissent in *Stone v. Powell*.⁷⁸ Justice White defined a good faith exception as the nonapplication of the exclusionary rule "where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief."⁷⁹ According to Justice White's definition, a good faith exception would not apply where a police officer had only a subjective belief that his actions were consistent with the fourth amendment.⁸⁰ The exception would apply, however, where that subjective belief was also objectively reasonable.⁸¹

A good faith exception applies to two types of fourth amendment violations—good faith mistakes and technical violations—declared Justice White.⁸² The good faith mistake occurs when a police officer must make a judgment as to fourth amendment probable cause where the underlying facts, the law, or the reliability of information the officer receives may be unclear. The police officer must judge whether to make an arrest, or conduct a search, though realizing that courts may differ on whether probable cause existed "no

ecution, but held the evidence admissible in the federal tax proceeding because exclusion would not deter the police officers. The Court also noted the police officers' "good-faith reliance on a warrant that later proved to be defective" *Id.* at 447.

76 *Id.* at 453-54.

77 *Id.* at 458-59 n.35, *relying on* United States v. Peltier, 422 U.S. 531 (1975), and Michigan v. Tucker, 417 U.S. 433 (1974).

78 428 U.S. 465 (1976) (where a state court provided the opportunity for full and fair litigation of a fourth amendment claim, federal courts will deny habeas corpus relief if the relief is sought because the state court admitted evidence obtained by an illegal search and seizure).

79 *Id.* at 538 (White, J., dissenting).

80 See note 53 *supra*.

81 428 U.S. at 540 (White, J., dissenting). Chief Justice Burger concurred in the Court's judgment and supported Justice White's good faith exception. The Chief Justice urged either an acceptance of the exception or a complete rejection of the exclusionary rule. *Id.* at 500-01.

82 *Id.* at 538-39.

matter how reasonable the grounds . . . appeared to the officer and though reasonable men could easily differ on the question."⁸³

The second type of fourth amendment violation to which a good faith exception could apply is the technical violation, occurring when the law changes after the police officer has made his decision in reliance upon the former law. A court will then hold that technically no probable cause existed, even though it actually existed when the officer made his decision.⁸⁴

Justice White's *Stone* dissent concluded that, with both the good faith mistake and the technical violation, the costs of exclusion outweigh any deterrent benefits:

In these situations, . . . excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of them the officer is acting as a reasonable officer would and should act in similar circumstances. . . .

When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.⁸⁵

Michigan v. DeFillippo,⁸⁶ the Court's most recent decision on good faith, applied Justice White's technical violation good faith exception. In *DeFillippo*, the defendant was arrested pursuant to a Detroit ordinance that allowed police officers to stop and question anyone whose behavior reasonably warranted further investigation for criminal activity, and to arrest those who refused to give their identification. The Court held the statute unconstitutional, but stated that the arrest made in good faith reliance on the statute was appropriate.⁸⁷

83 *Id.* at 539. The Supreme Court has not decided a good faith mistake case. An example of a good faith mistake case is *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 946 (1981).

84 *Stone* illustrates the technical violation good faith exception. The police officer had arrested and searched the defendant pursuant to a vagrancy statute later declared unconstitutional. *Peltier* and *Brown* also involved technical violations of the fourth amendment.

85 428 U.S. at 539-40.

86 443 U.S. 31 (1979).

87 *Id.* at 37. *Cf.* *Howard v. State* (Tex. Crim. App. Sept. 19, 1979) (*DeFillippo* technical violation good faith exception distinguished and evidence suppressed because police officers

The trial court thus erroneously suppressed evidence seized incident to the arrest.

B. *The Fifth Circuit*

The Fifth Circuit, in *United States v. Williams*,⁸⁸ adopted a good faith mistake exception to the exclusionary rule. Several good faith cases in the Fifth Circuit cleared the way for the *Williams* holding. The court first accepted the technical violation good faith exception in *United States v. Kilgen*,⁸⁹ holding that "overturning a conviction due to an invalid statute does not automatically render the previous arrest and detention illegal absent some showing that police officials lacked a good faith belief in the validity of the statute."⁹⁰ The Court found that excluding reliable evidence seized pursuant to a valid statute served no exclusionary rule rationale.⁹¹

The Fifth Circuit apparently applied a good faith mistake exception in *United States v. Hill*.⁹² In *Hill*, the court decided that police officers' oral testimony before a magistrate sufficiently bolstered an otherwise deficient affidavit to provide probable cause for issuing a search warrant. In holding that the trial court should not have excluded the evidence gained by using the search warrant, the court focused on the police officers' good faith in appearing before a magistrate. The court found that any error in the warrant-obtaining pro-

seized the evidence pursuant to a statute so blatantly unconstitutional that good faith reliance on it was impossible).

88 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 946 (1981). See text accompanying note 7 *supra*.

89 445 F.2d 287 (5th Cir. 1971). In *Kilgen*, the defendant, while detained by the police for violating a vagrancy ordinance, confessed to stealing postage stamps. The confession was admissible and the conviction upheld because of the police officers' good faith reliance on the vagrancy ordinance, even though a court later declared the ordinance unconstitutional.

90 *Id.* at 289. See also *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc), *cert. denied*, 446 U.S. 956 (1980); *Moffet v. Wainwright*, 512 F.2d 496 (5th Cir. 1975). In *United States v. Carden*, 529 F.2d 443 (5th Cir. 1976), *cert. denied*, 429 U.S. 848 (1976), the court, in a case similar to *Kilgen*, stated:

We require police officers to keep abreast of the changing contours of criminal and constitutional law as they develop through legislative action and judicial decision. But we have been reluctant to, and will not in this case, also require that they forecast future judicial decisions as to the constitutionality of the statutes under which they must make arrests. There is no evidence whatsoever in the record that the arresting officers did not believe that the . . . loitering ordinance was constitutionally valid. . . . Under such circumstances, we must reject the [defendants'] attempt to assert the unconstitutionality of the ordinance to invalidate their arrest.

Id. at 445.

91 The Court also relied on *Pierson v. Ray*, 386 U.S. 547 (1967), which allowed a good faith defense to police officers defending civil actions.

92 500 F.2d 315 (5th Cir. 1974).

cedure in *Hill* did not justify excluding the evidence gained, because exclusion "would in no way serve the deterrent purposes of the rule."⁹³ Although the court labeled the violation a "technical" one, it was not a technical violation coming under a good faith exception, because there was no good faith reliance on a law or procedure that was later changed. The court should have labeled *Hill* a good faith mistake case. If the police officers were mistaken, they had acted reasonably and in good faith by attempting to comply with the legal requirements for obtaining a warrant.

Having tacitly accepted the good faith mistake exception in *Hill*, the Fifth Circuit expressly adopted it in *Williams*.⁹⁴ In that case, a Drug Enforcement Administration (DEA) agent, knowing that an appeal bond restricted Williams to Ohio, saw her deplane a Los Angeles to Atlanta flight. The DEA agent arrested her for "bail jumping"⁹⁵ before she could board another plane. A search incident to the arrest produced a packet of heroin, and a subsequent search pursuant to a search warrant led to more heroin. The district court subsequently granted the defendant's motion to suppress the heroin evidence. A Fifth Circuit panel, *Williams I*,⁹⁶ affirmed the exclusion in a two to one decision.

The *Williams I* majority stated that bail jumping is not a crime unless the defendant "willfully fails to appear before any court or judicial officer as required. . . ." ⁹⁷ Therefore, the defendant had not violated the bail jumping statute by leaving Ohio. Since the DEA agent had no reasonable basis for believing that the defendant had failed to appear as required, the agent did not have probable cause to make the arrest. As a result, the subsequent searches violated the fourth amendment, requiring suppression of the heroin evidence.

Judge Charles Clark dissented, urging the court to use *Williams I* to adopt a good faith mistake exception to the exclusionary rule.⁹⁸ Relying on *Stone* and *Calandra*, Judge Clark emphasized that the exclusionary rule's purpose is "to take away any temptation of law en-

93 *Id.* at 322.

94 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 946 (1981). *Williams* was first heard by a three-judge panel and is referred to herein as *Williams I*, 594 F.2d 86 (5th Cir. 1979). The decision alternatively adopting the good faith exception was rendered by the Fifth Circuit on rehearing en banc and is referred to herein as *Williams II*, 622 F.2d 830 (5th Cir. 1980).

95 18 U.S.C. § 3150 (1976).

96 594 F.2d 86 (5th Cir. 1979).

97 18 U.S.C. § 3150 (1976).

98 594 F.2d at 97-98 (Charles Clark, J., dissenting).

forcement officials to *knowingly* violate the rights of citizens by denying to the public proof of criminal conduct disclosed by such wrongful police activity.⁹⁹ Because the exclusionary rule applies only when it best serves its deterrence rationale,¹⁰⁰ it should not apply "unless the officer knows or should know his activities transgress the bounds of the law."¹⁰¹ The *Williams I* dissent concluded that courts ought to judge police officers' actions by a standard of everyday practical common sense.¹⁰²

Upon rehearing en banc, in *Williams II*, there were two alternate majorities within the twenty-four judge panel.¹⁰³ The (Judge) Politz majority held that the DEA agent validly arrested the defendant and that the trial court should have admitted the evidence seized incident to that arrest.¹⁰⁴ Since the arrest and subsequent searches were constitutional, no inquiry into the applicability of the exclusionary rule was necessary. The (Judge) Gee majority, however, held that regardless of the arrest's validity, the trial court should have admitted the evidence, because the DEA agent seized the evidence pursuant to an objectively reasonable good faith mistake.¹⁰⁵ Thus, the Gee majority reasoned, the Politz majority's inquiry into the constitutionality of the arrest and subsequent searches was unnecessary, because of the good faith mistake exception.

The Gee majority further declared that the exclusionary rule is a judicially created rule justified only by its deterrent effect on future police misconduct.¹⁰⁶ They also stated that no deterrent value exists

99 *Id.* (emphasis added).

100 *Id.*, citing *United States v. Calandra*, 414 U.S. 338, 348 (1974).

101 594 F.2d at 98 (Charles Clark, J., dissenting).

102 *Id.* The dissent added that "[w]hile the bright light of post-incident litigation permits trained legal minds to agree that [the DEA agent] made a mistake of law, such post hoc rationalization should not be the basis for judging his actions for purposes of applying the exclusionary rule." *Id.* at 97.

103 Sixteen judges of the twenty-four judge panel joined in Judge Politz's opinion to declare the arrest and searches valid ("the Politz majority"). Thirteen judges joined in an opinion by Judges Gee and Vance to declare the exclusionary rule inapplicable by operation of a good faith exception ("the Gee majority").

104 The Politz majority relied on 18 U.S.C. § 401(3) (1976), stating that disobedience to a court's lawful order, such as an appeal bond restriction, is contempt of court. Furthermore, criminal contempt for a federal court is a federal crime that need not be initiated solely by the courts. Thus, a DEA agent has power under 21 U.S.C. § 878(3) (1976) to make a valid warrantless arrest for any federal crime that was committed in his presence. 622 F.2d at 836-39.

105 622 F.2d at 840.

106 *Id.* at 840-41. The court reasoned that the exclusionary rule should not be applied where it fails to deter police misconduct. *Id.* at 841, citing *Stone v. Powell*, 428 U.S. 465, 486-87 (1976) (White, J., dissenting); *United States v. Calandra*, 414 U.S. 338, 348 (1974); *United States v. Cruz*, 581 F.2d 535, 538 n.1 (5th Cir. 1978) (en banc).

in censuring the conduct of police officers who believed that they were acting legally. The Gee majority emphasized that subjective good faith alone would not suffice; a police officer's belief "must . . . be based on articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully."¹⁰⁷ The Gee majority held, therefore, that because the exclusionary rule exists to deter only willful or flagrant police violations,¹⁰⁸ "evidence is not to be suppressed . . . where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized."¹⁰⁹

III. The Good Faith Exception: Critique

A. *Rationales*

1. Deterrence

The exclusionary rule's proponents agree that the rule should not apply when no deterrence results.¹¹⁰ They agree further that the exclusionary rule lacks a specific deterrence where police officers have acted in objectively reasonable good faith in illegally seizing evidence.¹¹¹ In *Williams II*, the Gee majority urged that censuring police officers who thought they were acting legally has no deterrent value.¹¹² The deterrence rationale presumes that courts refuse to admit illegally seized evidence in order to teach the offending police officer, and similarly situated officers, to use greater care in safe-

107 622 F.2d at 841, n.4a.

108 The Gee majority adopted a narrower view of deterrence than that expressed by the Supreme Court. Whereas the Gee majority stated that the exclusionary rule deters only willful or flagrant fourth amendment violations, the Court in *Michigan v. Tucker*, 417 U.S. 433, 447 (1974) stated that the exclusionary rule exists to deter willful or negligent fourth amendment violations.

109 622 F.2d at 840.

110 See, e.g., *United States v. Ajlouny*, 629 F.2d 830, 840 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 920 (1981); Friendly, *supra* note 4, at 951-53. The Burger Court has not applied the exclusionary rule in the following cases for lack of deterrence: *United States v. Ceccolini*, 435 U.S. 268 (1978) (introducing a live witness who was discovered because of a fourth amendment violation); *Stone v. Powell*, 428 U.S. 465 (1976) (denying federal habeas corpus relief based on fourth amendment violations); *United States v. Janis*, 428 U.S. 433 (1976) (using evidence, illegally seized by state police officers, in a federal civil proceeding); *United States v. Calandra*, 414 U.S. 338 (1974) (questioning a grand jury witness by using illegally seized evidence); *Harris v. New York*, 401 U.S. 222 (1971) (using the defendant's illegally obtained statements to impeach the defendant's trial testimony).

111 See, e.g., *People v. Tindal*, 69 A.D.2d 58, 61-2, 418 N.Y.S.2d 815, 818 (1979).

112 622 F.2d at 842. The court noted that it would be possible to deter police officers who thought they were acting legally only if "we somehow wish to deter them from acting at all." *Id.* The latter is precisely Justice Brennan's view in his *United States v. Peltier* dissent. See notes 113-18 *infra* and accompanying text.

guarding fourth amendment rights. However, because police officers are likely to repeat good faith actions in similar situations, "the deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct" ¹¹³

Justice Brennan, however, disagrees that the deterrence rationale warrants a good faith mistake exception.¹¹⁴ In his view, the exclusionary rule's purpose is to deter the law enforcement community in general, since the offending police officer will probably never receive an individual punishment for his fourth amendment violation.¹¹⁵ Thus, the exclusionary rule serves to remove the inducement for all police officers to violate the fourth amendment.¹¹⁶ Justice Brennan argues further that a good faith mistake exception would encourage law enforcement officials to act on doubt. If a police officer is unsure whether probable cause is present, but believes his seizing of evidence would be "objectively reasonable," he may act upon that belief rather than ensuring his compliance with the fourth amendment.¹¹⁷ Justice Brennan emphasizes, therefore, that the exclusionary rule's purpose is to discourage police officers faced with uncertain situations from always choosing to compromise fourth amendment rights.¹¹⁸

The deterrence rationale does not merely seek the prevention of future misconduct by the offending police officer, which is a situation that could justify the use of a good faith mistake exception where the officer has acted in objectively reasonable good faith. Rather, deterrence is intended to remove the incentive of all police officers to violate the fourth amendment. Because the good faith mistake exception's "objective reasonableness" standard does not deter, but encourages, fourth amendment violations, the deterrence rationale weighs heavily against the judicial adoption of the good faith mistake exception.

¹¹³ *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

¹¹⁴ *United States v. Peltier*, 422 U.S. 531, 544-62 (1975) (Brennan, J., dissenting).

¹¹⁵ *Id.* at 557. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709-11 (1970), for a discussion of the difference between general and specific deterrence.

¹¹⁶ *Accord*, Schrock & Welsh *supra* note 9, at 378 ("[t]he exclusionary rule . . . is old-fashioned self-denial").

¹¹⁷ Justice Brennan's analysis concerning police officers ensuring compliance with the fourth amendment when in doubt applies only to good faith mistakes, not to technical violations. The latter involves no doubt because police officers act pursuant to then-valid law.

¹¹⁸ 422 U.S. at 559 (Brennan, J., dissenting).

2. Judicial Integrity

Although deterrence is the exclusionary rule's primary rationale, the judicial integrity rationale remains important in assessing the rule's emerging good faith exceptions. The Court in *Peltier* stated that, in both the good faith mistake and the technical violation situations, the admissibility of illegally seized evidence does not impair judicial integrity. The Court required, however, that the police officer act in good faith and reasonably believe that his actions were legal.¹¹⁹ The Court stated further that the exclusion, not the inclusion,¹²⁰ of competent evidence harms judicial integrity when a police officer has seized the evidence in good faith.¹²¹

The effect on judicial integrity of including or excluding allegedly tainted but reliable evidence depends little on whether a court initially focuses on the violation or on the remedy.¹²² If a court first decides that a fourth amendment violation occurred, a good faith exception to the exclusionary rule would permit a court to convict a defendant by using evidence specifically found to be illegally seized. Permitting a defendant's conviction based on illegally seized evidence impairs judicial integrity to a greater degree than excluding illegally seized, yet reliable, evidence. On the other hand, if a court decides first that the good faith mistake exception applies, then the court will not reach the violation issue. Nevertheless, a court may still impair judicial integrity by not deciding if a violation occurred, because illegally seized evidence may still have been the basis of a conviction.

The judicial integrity rationale demands that a court not use illegally seized evidence to convict a defendant, regardless of the evidence's reliability or the police officer's good faith. A court that applies a good faith mistake exception will either acknowledge or will ignore a fourth amendment violation, and thereby will at least risk convicting the defendant with the aid of illegally seized evidence.

119 *Id.* at 538.

120 Justice Brennan strongly dissented from the exclusive emphasis on deterrence in *United States v. Calandra*, 414 U.S. 338 (1974), preferring to analyze the exclusionary rule in terms of judicial integrity as well. Justice Brennan urged that admitting illegally seized evidence undermines popular trust in government, regardless of how the police officer obtained the evidence. *Id.* at 360 (Brennan, J., dissenting) ("the Court today discounts to the point of extinction the vital function of the [exclusionary] rule [which is] to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct").

121 See Wilkey, *supra* note 5, at 223 ("the exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system"); Kaplan, *supra* note 4, at 1036 n.53.

122 See text accompanying notes 133-42 *infra*.

The greatest blow to judicial integrity is not the exclusion of tainted yet reliable evidence; it is the lack of a remedy for a clear fourth amendment violation.

B. *Effect on Police Officers*

An evidentiary suppression hearing focuses exclusively on the police officer, determining whether the officer had violated the fourth amendment. Justice Brennan has expressed concern that a good faith mistake exception to the exclusionary rule would "vastly exacerbate" this focus on the police officer.¹²³ However, his concern is unrealistic, since the suppression hearing will always focus *solely* on the police, even if courts adopt the good faith mistake exception.

Because the exclusionary rule's primary rationale is deterrence of future police misconduct, the rule's major purpose is educating police officers concerning the scope of their search and seizure powers. In *Williams II*, Judge Hill concurred with the *Gee* majority, stating that the good faith mistake exception encourages police officers to learn fourth amendment law rather than rewarding their ignorance by admitting illegally seized evidence at trial.¹²⁴ He reasoned that, since the good faith mistake exception includes an objective reasonableness standard as well as a subjective good faith standard, police officers must maintain objective reasonableness in fourth amendment-related conduct.¹²⁵

The exclusionary rule, however, requires a police officer to act with probable cause, which is a more exacting standard for the officer than is objective reasonableness. The good faith mistake exception applies when a police officer has acted without probable cause, thereby violating the fourth amendment. The exception admits the illegally seized evidence if the officer acted in objectively reasonable

123 *United States v. Peltier*, 422 U.S. 531, 561 (Brennan, J., dissenting).

124 622 F.2d at 848 (Hill, J., concurring specially).

125 Judge Rubin, however, was uneasy with Judge Hill's assertion that an objectively reasonable good faith exception would encourage learning. Judge Rubin stated:

A policeman who is in completely good faith is unlikely to stop to ask himself, "Am I also reasonable?" The additional criterion that the mistaken belief that the officer is also acting correctly must also be reasonable suggests uneasiness with the reliability of the good faith test. It cannot be justified on the unsupported proposition that *if* the police know good faith alone will not suffice, they will also be encouraged to learn constitutional law and deterred from acting in either ignorance or unreasonableness.

Id. at 850 n.4 (Rubin, J., concurring specially). Judge Rubin must therefore believe that police officers will not learn fourth amendment doctrine, but will act solely on what they believe to be their authority. If he is correct, then society cannot reasonably expect police officers to ask if their actions meet a stricter probable cause standard.

good faith. Thus, objective reasonableness is necessarily a lower objective standard than the present probable cause standard. As a result, the good faith mistake exception does not, as Judge Hill correctly asserts, reward a police officer's ignorance,¹²⁶ but does encourage him to learn less than the present probable cause standard.¹²⁷

Legal commentators have criticized the present exclusionary rule for creating the "occasion and incentive for large-scale lying by law enforcement officers."¹²⁸ They state further that courts adopting a good faith mistake exception will spur an even greater incentive for police officer perjury, because of the exception's emphasis on subjective good faith. Because the good faith mistake exception requires objective reasonableness in addition to subjective good faith,¹²⁹ it is questionable whether police officers will admit bad faith when their actions were proper as measured against the applicable objective standard.¹³⁰ Professor Amsterdam states that "[a] subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably."¹³¹ Courts that choose to adopt a good faith mistake exception must prevent this result by requiring the state to prove good faith, rather than merely believing the police officer's testimony or forcing the defendant to prove bad faith. Each court should establish a uniform standard of proof by which to measure alleged good faith. Salient factors should include the offending police officer's motive, *i.e.*,

126 *Contra*, Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 84 n.112 (1978), quoting Kaplan, *supra* note 4, at 1044 ("[the good faith exception] 'would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him'"). Professor Kaplan, however, made that statement when discussing a purely subjective good faith exception that would reward ignorance in the absence of objective standards. An objectively reasonable good faith exception would not put a premium on ignorance because searches and seizures must meet objective standards.

127 *Contra*, Bernardi, *supra* note 4, at 106 ("it seems highly imprudent to depend primarily upon the speculative assistance of the exclusionary rule to educate police in fourth amendment requirements").

128 Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1970). *Accord*, Wilkey, *supra* note 5, at 226; Note, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 KAN. L. REV. 768, 778-79 (1972).

129 See text accompanying notes 80-81 *supra*.

130 *Accord*, Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 180 (1979) ("[it seems] a rather tenuous basis for limiting access to fourth amendment rights [to believe] that police officers will conscientiously report to judicial or prosecutorial authorities all instances in which bad faith motivated the search or seizure").

131 Amsterdam, *supra* note 4, at 437.

whether there is sufficient evidence without the evidence seized illegally but in good faith, whether the police officer acted on independent legal advice, whether the officer acted in an emergency situation, and the officer's prior experience in similar situations.¹³² Adoption of such a procedure will assure the public that courts will not ignore the subjective element.

C. *Administrative Problems*

Proper analysis of a good faith mistake exception requires that trial courts determine the existence of both subjective good faith and objective reasonableness in the police officer's conduct. Proof of a police officer's subjective good faith adds a difficult fact-finding operation for the trial court. Furthermore, a trial court's case-by-case discretion in defining objective reasonableness could result in widely divergent factual findings, unreviewable on appeal.¹³³ The exclusionary rule could thus lose whatever certainty of application it now has. The Supreme Court should, therefore, if it adopts the good faith mistake exception, define "objective reasonableness" and set forth standards of proof.¹³⁴

In addition, courts that adopt a good faith exception should employ the logical analytical framework found in *Scott v. United States*.¹³⁵ In *Scott*, the Supreme Court established chronological review as the proper order of analysis in fourth amendment cases. First, a court must determine whether the police officer lacked probable cause and thereby violated the fourth amendment. This objective inquiry involves no consideration of the police officer's state of mind. Second, the court must decide whether the exclusionary rule is an appropriate remedy for the fourth amendment violation. If the court employs a good faith exception, it would only consider subjective good faith

132 Other factors, useful for proving objective reasonableness as well as good faith, could include the following: (1) the police officer's statements to the defendant and to other officers; (2) statements made to the offending officer by other officers; (3) the officer's statements to non-officer third parties; (4) whether the officer contacted or attempted to contact his superiors or a prosecutor to request advice; and (5) whether the officer acted pursuant to a third-party tip.

133 See Kaplan, *supra* note 4, at 1045 (such case-by-case discretion could constitute "almost an open invitation to nullification at the trial court level"). Although Professor Kaplan made this comment in a purely subjective good faith context, the addition of another difficult fact-finding operation is nevertheless a concern in the objectively reasonable good faith context. See generally *United States v. Peltier*, 422 U.S. 531, 560 n.20 (Brennan, J., dissenting); Kamisar, *supra* note 126, at 84 n.112.

134 See note 132 *supra*, and accompanying text.

135 436 U.S. 128 (1978) (holding that where objective standards are met, there is no fourth amendment violation even where police officers act in subjective bad faith).

in the second inquiry.¹³⁶

The application of *Scott's* chronological analysis will have two significant results. First, a trial court's fact-finding burden will increase if it employs the good faith mistake exception, because certain cases would require a determination of both a fourth amendment violation and an alleged good faith mistake.¹³⁷ Second, *Scott's* chronological analysis clearly distinguishes between the violation and the remedy. Because a court would consider good faith with respect to the remedy only after finding a fourth amendment violation, a finding of good faith would not hide a fourth amendment violation's existence.¹³⁸

Scott's chronological analysis, however, contravenes the doctrine that a court will not decide a constitutional issue unless strictly necessary.¹³⁹ If the record presents another ground upon which the case can be decided, then the court should not address the constitutional issue.¹⁴⁰ The two concurring opinions in *Williams II* illustrate the tension between *Scott's* chronological analysis and the strict necessity doctrine.¹⁴¹ Judge Rubin, concurring with the Politz majority, employed *Scott's* chronological analysis in stating that the Gee majority should have delayed its "hypothetical" decision to adopt the good faith mistake exception until a case arose in which a police officer had violated the fourth amendment. "Only in [the] event [that a police officer violated a defendant's fourth amendment rights] would

136 *Id.* at 135-36.

137 As a result of *Scott's* chronological analysis, there is no substitution of one fact-finding operation (application of the exclusionary rule) for another (whether a constitutional violation exists). Judge Friendly supports the substitution advantage. *See* Friendly, *supra* note 4, at 953 ("the recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve [judges] of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one").

138 *Contra*, Ball, *supra* note 12, at 644 ("a reasonable although mistaken reliance upon the validity of a statute or construction of a statute is sufficient to establish probable cause, and that probable cause continues to render the search reasonable even when the statute or construction is subsequently rejected").

139 *See* *Rescue Army v. Municipal Ct.*, 331 U.S. 549, 574-85 (1947); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[the Court] will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of").

140 The strict necessity doctrine generally involves two violations, where one is of constitutional import. The good faith exception concerns a violation and a remedy. Nevertheless, the strict necessity doctrine concerns deciding the nonconstitutional "ground," and is not limited to situations involving only violations.

141 622 F.2d at 848-51 (Rubin, J., concurring specially); *id.* at 847-48 (Hill, J., concurring specially).

it be necessary to consider whether evidence unconstitutionally taken must be suppressed.”¹⁴² Judge Hill, on the other hand, concurring with the Gee majority, emphasized that the court should decide the search’s constitutionality under the fourth amendment only as a last resort. Thus, “if we find the evidence admissible without regard to the constitutional question, we should decline to reach and decide the [constitutional question].”¹⁴³

The strict necessity doctrine urges that a court “not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”¹⁴⁴ Thus, the doctrine leads to the illogical and unsound result that a court would determine the exclusionary rule’s applicability before it reaches the constitutional violation issue. Because the strict necessity doctrine is only a constructional rule of preference, the courts need not follow it. Therefore, if a court adopts a good faith exception, it should employ *Scott*’s chronological analysis, and determine whether a police officer has violated the fourth amendment before the court determines the appropriate remedy for that violation.

IV. Conclusion

The exclusionary rule is a judicially created remedy that penalizes police officers who violate the fourth amendment’s probable cause requirement. The exclusionary rule’s purpose is to deter future police misconduct, and not to enforce the personal rights of aggrieved individuals; therefore, the Constitution does not require the rule. As a result, a good faith exception to the exclusionary rule is a remedial modification, and is not barred by the fourth amendment.

The Supreme Court has already adopted the good faith technical violation exception. Police officers must operate within the confines of present legal requirements; society cannot hold them to standards elucidated in later judicial decisions or statutes. On the other hand, the Court should not, for several reasons, adopt the good faith mistake exception.

First, the deterrence sought by the exclusionary rule is general, not specific. A court that admits unconstitutionally seized evidence, because the police officer acted in objectively reasonable good faith, vindicates the offending officer. Thus, that officer and all similarly

142 *Id.* at 848 (Rubin, J., concurring specially).

143 *Id.* at 847 (Hill, J., concurring specially).

144 *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring).

situated police officers have an incentive to repeat conduct that falls short of the fourth amendment's probable cause requirement. Society has the right to expect police officers to uphold the fourth amendment when they face doubtful situations.

Second, the good faith mistake exception leaves a right without a remedy. After a court determines that the police officer did not meet fourth amendment requirements, the court's application of the good faith mistake exception would result in an unremedied fourth amendment violation. Even if a court determines first that the exclusionary rule is inapplicable regardless of a violation, police officers could have violated the fourth amendment. Certainly the previous Courts that decided *Weeks*, *Wolf* and *Mapp* did not intend any procedure that would leave fourth amendment violations unredressed.

Third, the good faith mistake exception encourages police officers to be more ignorant of fourth amendment law than under the current probable cause standard. If police officers can learn what is "objectively reasonable" within the meaning of the exception, then they should also learn the probable cause requirements.

Finally, the good faith mistake exception causes two significant administrative problems—an added fact-finding operation and an undefined standard of "objective reasonableness." The exception requires courts to adjudicate an objective element, as is currently done with probable cause, and an added subjective element. The triable issues increase even if a court chooses to analyze the exclusionary rule's applicability before deciding whether a police officer committed a fourth amendment violation. Furthermore, no court has yet defined "objective reasonableness." Particularly in the Fifth Circuit, where *United States v. Williams* allows the courts to apply the exception but fails to give them guidance on what degree of proof they should require, trial courts are likely to establish widely divergent standards concerning what is objectively reasonable.

Should a court choose to adopt the good faith mistake exception, however, it should adopt certain procedures to mitigate the exception's shortcomings. First, the court must place on the state a uniform burden of proof concerning a police officer's good faith. Second, the court must set forth a uniform definition of "objective reasonableness." Finally, the court should, in good faith cases, adopt a chronological form of analysis. This analysis determines first whether the police officer committed a fourth amendment violation, and then examines the applicability of the exclusionary rule.

The public places enormous pressure on police departments to

solve and prevent crime.¹⁴⁵ Police officers find it difficult to make immediate fourth amendment judgments, particularly when a court may, after months of detached deliberation, narrowly decide otherwise. The good faith mistake exception lowers objective fourth amendment standards, and thus does no more to teach police officers what is consistent with the fourth amendment. Rather, a lesser standard eliminates much of the police officers' uncertainty concerning probable cause, and authorizes conduct that falls short of the probable cause requirement. Instead of legitimizing and encouraging conduct that violates the fourth amendment, the Supreme Court should teach police officers the fourth amendment requirements. The Court must therefore redefine probable cause, reasonableness, and "reasonable expectation of privacy" so that police officers understand the limitations on their power. Deterrence of future police misconduct, the current rationale of the exclusionary rule, is only possible if police officers know why certain conduct was wrong and whether it will be wrong again if repeated. The Court should not, however, give up on the fourth amendment by adopting the good faith mistake exception to the exclusionary rule.¹⁴⁶

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145 See, e.g., Bernardi, *supra* note 4, at 52 ("[the adoption of a good faith exception] will lessen the tension which presently exists between the need for effective law enforcement and the desire to protect fourth amendment rights"); Address by Chief Justice Burger to the American Bar Association (Feb. 8, 1981).

146 Accord, 34 VAND. L. REV. 213 (1981); 15 GA. L. REV. 487 (1981); *contra*, Attorney General's Task Force Report on Violent Crime, Final Report, at 55-56 (Aug. 17, 1981).