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Proposal for a Workable Good Faith Exception to the Exclusionary Rule: Prospective Judgments

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PROPOSAL FOR A WORKABLE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE: PROSPECTIVE JUDGMENTS

In United States v. Leon *and* Massachusetts v. Sheppard, *the United States Supreme Court adopted a modified good faith exception to the exclusionary rule. The adopted exception was limited to cases in which evidence was illegally seized as a result of an improperly issued search warrant which was relied on by the seizing officer in good faith. These decisions illustrate the Court's willingness to reevaluate the objectives of the exclusionary rule and portend the adoption of a good faith exception in which evidence will be held admissible when an officer acts under the reasonable, though mistaken, belief that his search or seizure was legal. This Comment examines the workability of such a good faith exception, and proposes a prospective judgment procedure which preserves the deterrent efficacy of the exclusionary rule and promotes development of fourth amendment principles.*

INTRODUCTION

In October of 1982, the Supreme Court heard argument in *Illinois v. Gates*,[1] regarding whether probable cause for a search warrant could be based upon corroborated information provided by an anonymous informant, who did not disclose how he acquired his information. Six weeks later, the Court restored the case to the calendar for reargument and requested that both parties address an additional issue: "[w]hether the rule requiring the exclusion at criminal trial of evidence obtained in violation of the Fourth Amendment,[2] . . . should to any extent be modified so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth

1. No. 81-430, slip op., (1983).
2. *See* Mapp v. Ohio, 367 U.S. 643 (1961); *infra* text accompanying notes 20-21.

Amendment."[3]

The case was reargued before the Supreme Court in March of 1983; however, the Court's decision expressly declined to resolve the issue upon which it had ordered the reargument.[4] In justifying its position, the Court noted the good faith issue was neither raised by Illinois nor addressed in the lower courts. Thus, the Court concluded that jurisprudential considerations dictated "that we reserve for another day the question whether the exclusionary rule should be modified."[5]

Three weeks after *Gates*, the Supreme Court granted certiorari in *United States v. Leon*[6] and *Massachusetts v. Sheppard*,[7] which raised the issue of whether the Court should adopt a good faith exception to the exclusionary rule. In July, 1984, the Court delivered its opinion in these cases and held that the exclusionary rule should be "modified so as not to bar the use of . . . evidence obtained by officers acting in *reasonable* reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[8]

In addition to the *Leon* and *Sheppard* decisions, in the past two decades the Supreme Court has fashioned several exceptions to the exclusionary rule;[9] four Justices have authored opinions which indicate they firmly favor adopting a good faith exception.[10] Also noteworthy is Justice O'Connor's statement at her confirmation hearing that her experience as a trial judge "had led her to conclude that the exclusionary rule sometimes interfered with the administration of justice by requiring the exclusion of evidence."[11] Although the Court only adopted a modified good faith exception to the exclusionary rule, its holdings in *Leon* and *Sheppard* are indicative of the Court's increasing willingness to create an exception to the exclusionary rule for evidence obtained by an officer who acted under a mistaken, but reasonable, good faith belief that his actions comported with the fourth amendment. With five Justices favoring a good faith excep-

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3. No. 81-430, slip op. at 1 (1983).
4. *Id.* at 2.
5. *Id.* at 9.
6. 679 F.2d 534 (5th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3919 (U.S. June 27, 1983) (No. 82-1771).
7. Massachusetts v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 51 U.S.L.W. 3919 (U.S. June 27, 1983) (No. 82-963).
8. United States v. Leon, 52 U.S.L.W. 5155, 5155 (U.S. July 5, 1984) (No. 82-1771)(emphasis added).
9. *See infra* text accompanying notes 27-42.
10. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 606 (1975) (Powell, J., and Rehnquist, J., concurring).
11. N.Y. Times, Sept. 11, 1981, at 9, col. 3.

tion and the adoption of a modified exception, the question presented before the Supreme Court is not whether the Justices should adopt such an exception, but rather how it may be administered.

This Comment addresses the workability of a good faith exception to the exclusionary rule. First, the Comment reviews the development of the exclusionary rule and the good faith exception. Second, it discusses the arguments against the exception. Finally, it proposes a prospective judgment procedure which will resolve problems of administration of the exception and establish a workable good faith standard.

THE EXCLUSIONARY RULE

Part II of this Comment is an overview of the origins of the exclusionary rule and the development of the good faith exception. This examination will demonstrate that a good faith exception which preserves the deterrent objectives of the exclusionary rule can be developed and practically implemented by the courts.

Origins of the Exclusionary Rule

The origins of the exclusionary rule may be traced to the Supreme Court's 1886 decision in *Boyd v. United States*.[12] In *Boyd*, the defendant was charged with the illegal importation of goods. Relying on a federal statute, the government obtained a court order compelling the defendant to produce invoice papers which would show the quantity and value of the goods imported. Drawing an analogy to compelled self-incrimination,[13] the Supreme Court concluded that the fourth amendment prohibited compulsory production of the defendant's private books and papers.[14]

Several years after *Boyd*, the Court explicitly adopted an exclusionary rule based on fourth amendment considerations in *Weeks v. United States*.[15] In *Weeks*, the Court ordered evidence obtained in violation of the fourth amendment returned to a defendant charged with transporting lottery tickets through the mails. The Court noted

12. 116 U.S. 616 (1886).

13. The Court noted that "[a] witness, as well as a party, is protected by the [fifth amendment] law from being compelled to give evidence that tends to [incriminate] him." *Id.* at 638. "[A] compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment . . ., because it is a material ingredient, and [affects] the sole object and purpose of search and seizure." *Id.* at 622.

14. *Id.* at 638.

15. 232 U.S. 383 (1914).

that if materials obtained in violation of the fourth amendment could be used against the defendant, the guarantees of the fourth amendment "might as well be stricken from the Constitution."[16] Thus, the Court concluded that the lower court's refusal to grant the defendant's motion for return of the materials illegally seized was itself a violation of the constitutional rights of the accused. The majority, however, explicitly rejected application of the exclusionary rule to violations by state or local police, limiting its holding to searches and seizures by federal officers.[17]

In 1949, the Supreme Court ruled in *Wolf v. Colorado*[18] that the security of one's privacy against arbitrary intrusion by the police was at the core of the fourth amendment and was enforceable against the states by virtue of the fourteenth amendment. However, the Court ruled that the fourteenth amendment did not require a state to enforce this right through the exclusionary rule.[19] Although the exclusionary rule expanded the right of people to be secure from unreasonable searches and seizures by the states, there was no concomitant means to enforce these rights at the state level save by civil and equitable remedies.[20]

After more than a decade of controversy and confusion following *Wolf*, the extension of the exclusionary rule to state prosecutions was inevitable. In 1961, the Supreme Court made such an extension. The majority opinion in *Mapp v. Ohio*[21] found the exclusionary rule an essential part of the fourth amendment "as the right it embodies is vouchsafed against the States by the Due Process Clause."[22] Thus, the Court reasoned that the fourth amendment created the exclusionary rule and the fourteenth amendment made it applicable to the states.

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16. *Id.* at 393.
17. *Id.* at 398.
18. 338 U.S. 25 (1949).
19. *Id.* at 33. Justice Frankfurter noted in the majority opinion that the Court would not "condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." *Id.* at 31.
20. Many categories of police abuses are actionable as common law torts in state courts. *See generally* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 498, 513 (1955). At the federal level, 42 U.S.C. § 1983 (Supp. III 1979) provides a civil remedy for the deprivation of federally protected rights by a person acting under the color of state law. *See also* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Nelson v. Steiner, 262 N.W.2d 579 (Iowa 1978).
21. 367 U.S. 643 (1961).
22. *Id.* at 651.

Deterrence and the Balancing Test

Initially, the Supreme Court adopted three justifications for the exclusionary rule: (1) protection of personal rights, (2) preservation of judicial integrity,[23] and (3) deterrence of unlawful police conduct. Today, the Supreme Court has retained only the deterrence rationale in its explanation of the underlying purpose of the exclusionary rule.[24] The deterrence rationale has been the primary reason cited for adopting a good faith exception.[25] An analysis of the deterrence rationale is therefore essential to the development of a workable good faith exception to the exclusionary rule.

The deterrence rationale is based on the premise that 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."[26] The rationale first began to gain prominence in *Linkletter v. Walker*,[27] where the Court refused to apply *Mapp* retroactively. The Court reasoned that because the

23. Originally, the Court justified the exclusionary rule primarily on the judicial integrity and deterrence rationales. The judicial integrity rationale was premised on the belief that the courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Elkins v. United States, 364 U.S. 206, 223 (1960). *See also* Stone v. Powell, 428 U.S. 465, 485-86 (1975).

The personal rights rationale was summarily dismissed by the Supreme Court in United States v. Calandra, 414 U.S. 338 (1973). The Court reasoned "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim .... Instead, the rule's prime purpose is to deter unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures .... In sum, 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." *Id.* at 347-348.

24. *See infra* text accompanying notes 29-40; *see also* Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 17-24 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 669-72 (1970); Comment, *Impending "Frontal Assault" on the Citadel: The Supreme Court's Readiness to Modify the Strict Exclusionary Rule of the Fourth Amendment to a Good Faith Standard*, 12 TULSA L. J. 337, 350 (1976).

Justice Brennan has argued that the shift in emphasis on the deterrence rationale is misplaced, that deterrence was not even considered to be a justification for the exclusionary rule when it was first formulated. United States v. Calandra, 414 U.S. 338, 356 (1974) (Brennan, J., dissenting). *See also* United States v. Peltier, 422 U.S. 531, 553 n.13 (1975) (Brennan, J., dissenting); United States v. Leon, 52 U.S.L.W. 5155, 5161-67 (U.S. July 5, 1984)(No. 82-1771)(Brennan, J., and Marshall, J., dissenting).

25. *See infra* text accompanying notes 43-73. *See generally* Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L. J. 1361, 1378-1417 (1981); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 643-44, 651-55 (1978).

26. Elkins v. United States, 364 U.S. 206, 217 (1960).

27. 381 U.S. 618 (1965).

basis of the *Mapp* decision was that the exclusionary rule "was the only effective deterrent to lawless police action," applying *Mapp* retroactively would serve no purpose.[28] In short, releasing previously convicted prisoners would not correct the misconduct which occurred before the *Mapp* decision.

In *United States v. Calandra*,[29] the Supreme Court took the final step in identifying deterrence as the sole justification for the exclusionary rule. *Calandra* considered whether a grand jury witness could refuse to answer questions based upon evidence obtained in violation of the fourth amendment. The Court's reasoning was based solely upon the deterrence rationale.[30] Adopting a balancing analysis, the Court held that since the detriment to the grand jury's investigatory function far outweighed any potential deterrence to police misconduct, the rule would not be applied in the grand jury setting.[31]

The Court employed this same balancing analysis in *Stone v. Powell*,[32] where it refused to permit state prisoners to relitigate search and seizure claims in federal habeas corpus proceedings. Similarly, in *United States v. Janis*,[33] the Court determined that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion."[34] The balancing approach has also led the Court to conclude that unlawfully seized evidence may be admitted to impeach a defendant's testimony at his criminal trial;[35] and may be admitted when law enforcement agents act in good faith reliance upon a prior judicial decision, stat-

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28. *Id.* at 636.
29. 414 U.S. 338 (1974).
30. *Id.* at 347-52.
31. *Id.* at 349, 354. In reaching the conclusion that the use of illegally seized evidence would not be prohibited in grand jury proceedings, the Court stated:

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best . . . . We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.

Id. at 351-52 (footnote omitted).

The Court went on to establish the supremacy of the deterrence rationale by dismissing the judicial integrity argument in a footnote. The majority did not even recognize that judicial integrity is an independent rationale. The Court found that illegal conduct is not sanctioned by not extending the rule to a situation which does not further the deterrence function. *Id.* at 355 n.11. As the dissent pointed out, "the Court today discounts to the point of extinction the vital function of [judicial integrity]." *Id.* at 360 (Brennan, J., dissenting).

32. 428 U.S. 465 (1976). The Court held the substantial costs to society of suppressing probative evidence would outweigh any marginal deterrent effect. *Id.* at 490-95.
33. 428 U.S. 433 (1976).
34. *Id.* at 454.
35. United States v. Havens, 446 U.S. 620 (1980).

ute, or ordinance that is subsequently held to be unconstitutional.[36] Finally, in *United States v. Leon*,[37] the Court noted that the exclusionary rule was designed to deter police transgressions rather than to punish the errors of judges and magistrates.[38] Thus, where officers objectively rely in good faith on a subsequently invalidated search warrant, any evidence seized pursuant to that warrant may be admitted into evidence.[39]

These cases reflect the Court's gradual realization that "the exclusion of evidence is not a personal constitutional right but a remedy, which, like all remedies, must be sensitive to the costs and benefits of its imposition."[40] These cases further reflect the Court's growing tendency to adopt exceptions to the exclusionary rule which recognize that the costs of the rule may outweigh its presumed deterrent benefits. This may be particularly true when applied to reasonable, good faith police actions.[41] In short, the decision to exclude or not to exclude depends on whether the rule will effectively deter illegal searches at a reasonable cost to other values.[42]

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36. *See* United States v. Peltier, 422 U.S. 531 (1975); Michigan v. De Fillippo, 443 U.S. 31 (1979).

37. 52 U.S.L.W. 5155 (U.S. July 5, 1984)(No. 82-1771).

38. *Id.* at 5160.

39. *Id.* at 5162.

40. Illinois v. Gates, No. 81-430, slip. op. at 11 (1983) (White, J., concurring).

41. *See generally* 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). Professor Bernardi stated: "The decisional history of the exclusionary rule following *Mapp* must be seen as a gradual, yet inexorable movement towards adoption of a good faith standard to govern application of the rule." *Id.* at 58.

42. A necessary corollary of this decision is an evaluation of the substantiality of the anticipated deterrence. As the Court noted in Michigan v. Tucker, 417 U.S. 433, 447 (1974):

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

In a similar vein, in United States v. Peltier, 422 U.S. 531, 542 (1975), the Court stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

See also United States v. Janis, 428 U.S. 433, 458-59 & n.35 (1976).

The Good Faith Exception

An increasing number of legal commentators,[43] courts,[44] and legislative leaders,[45] have begun advocating an exception to the exclusionary rule for evidence obtained by a well-trained police officer who acted under a mistaken, but reasonable, good faith belief that his conduct comported with fourth amendment requirements. They reason that suppression in such cases accomplishes nothing beyond causing reliable evidence to be kept from the trier of fact.[46] This substantially impairs the truthfinding process,[47] sometimes permits dangerous criminals to be released,[48] and causes the public to lose faith in the criminal justice system.[49] Because the exclusionary rule is not constitutionally mandated, but is a judicially created remedy[50] designed solely to deter unconstitutional police conduct, it should be modified where suppression of probative evidence will have no deter-

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43. *See, e.g., supra* note 24.

44. *See, e.g.*, United States v. Ajlouny, 629 F.2d 830, 840-41 (2d Cir. 1980) (warrantless security wiretap although unlawful was not suppressed where agents acted in good faith and could not be charged with knowledge that their conduct was improper), *cert. denied*, 449 U.S. 1111 (1981); United States v. Thompson, 710 F.2d 1500, 1503 (11th Cir. 1983) (where entry into cabin of boat violated defendant's fourth amendment rights, evidence seized in inventory search incident to arrest did not require suppression under the good faith exception to the exclusionary rule); United States v. Nolan, 530 F. Supp. 386, 396-99 (W.D. Pa. 1981) (suppression not required for technical, good faith violation of knock-and-announce rule), *rev'd*, 718 F.2d 589, 598 n.14 (3d Cir. 1983) (declined to adopt good faith exception because it had not as yet been adopted by the Supreme Court); United States v. Wilson, 528 F. Supp. 1129, 1132 (S.D. Fla. 1982) (even though arrest which took place outside of officer's territorial jurisdiction was not a lawful citizen's arrest, good faith exception bars suppression of marijuana seized incident to the arrest); Gifford v. State, 630 S.W.2d 387, 391 (Tex. Ct. App. 1982) (suppression not required where officers relied in good faith on a search warrant later found to be technically defective); Richmond v. Commonwealth, 50 U.S.L.W. 2162 (Ky. Ct. App. 1981) (same); People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (N.Y. 1981).

45. *See, e.g.*, U.S. Dep't. of Just., Attorney General's Task Force on Violent Crime: Final Report 55 (1981). Recommendation 40 of the Report states that "evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment of the Constitution." For congressional action, *see, e.g.*, S. 2231, 97th Cong., 2d Sess. (1982), amending the federal criminal code to provide that evidence obtained by a search or seizure shall not be excluded in a federal proceeding if the seizing officer had a reasonable, good faith belief that the search or seizure was conducted in conformity with the fourth amendment to the Constitution. *See also The Exclusionary Rule Bills: Hearings on S. 101, S. 751, and S. 1995. Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 3 (1982). Legislation enacting a good faith exception has been adopted in Arizona and Colorado. *See* ARIZ. REV. STAT. § 13-3925 (1982) (Court not to suppress evidence if it "was seized by a peace officer as a result of a good faith mistake or technical violation"); COLO. REV. STAT. § 13-3-308 (1982) (similar).

46. *See* Stone v. Powell, 428 U.S. 465, 490-91 & n.29 (1976).

47. *See id. See also* Schroeder, *supra* note 24.

48. *See* Stone v. Powell, 428 U.S. at 490.

49. *See id.* at 491.

50. United States v. Calandra, 414 U.S. 338, 348 (1974).

rent effect,[51] i.e., where an officer acted under a reasonable, good faith belief that his actions were lawful.

As noted in the preceding section, the primary justification for the exclusionary rule is deterrence. A workable good faith exception should therefore preserve the deterrent efficacy of the rule. When an officer operates under a reasonable, though mistaken, belief about the law or certain facts, then the deterrent effect of the rule is obviated. A police officer will not be deterred from conducting an unconstitutional search or seizure if he does not know it is unconstitutional.

Police officers are not trained legal technicians. Deterrence does not occur so much because police officers read suppression decisions as it does because policy makers develop departmental policies in accordance with these decisions.[52] Through police training programs and internal guidelines, police officers are apprised of recent developments in fourth amendment law and are expected to alter their conduct accordingly. Unfortunately, however, the courts are often remiss in articulating coherent, readily recognizable fourth amendment standards. In turn, the law enforcement agencies have often left individual police officers to resolve these difficult questions while in the field.[53]

With so little judicial guidance, it is not surprising that inadvertent errors of judgment and honest mistakes occur when officers in

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51. Stone v. Powell, 428 U.S. at 538 (White, J., dissenting).

52. *See, e.g.*, J. SKOLNICK, JUSTICE WITHOUT TRIAL, 219-20 (2d Ed. 1975); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 430-32 (1974).

53. *See* New York v. Belton, 453 U.S. 454, 470 (1981) (Brennan, J., dissenting). A review of the Court's decisions in *Belton* and Robbins v. California, 453 U.S. 420 (1981), illustrates the problems that an officer in the field must face when conducting what he considers to be a reasonable search and seizure. The facts of these cases are remarkably similar. In both cases, police officers lawfully stopped a car, smelled marijuana, found marijuana in the passenger compartment, and lawfully arrested the occupants. Thereafter, in *Robbins*, the officers searched the car, found two packages wrapped in green opaque paper in the rear compartment of the car, opened the packages without a warrant, and discovered thirty pounds of marijuana. In *Belton*, the officer found a jacket in the passenger compartment, unzipped the jacket without a warrant, and found a quantity of cocaine.

In both *Robbins* and *Belton*, five opinions were delivered by the Court, none of which carried a majority. Ultimately, what emanated from the Court was a sharp division among the Justices as to whether the searches were legal. Thus, three Justices believed that both searches were legal, three Justices argued that both searches were illegal; and three Justices controlled the final decision. The officer who made the search in *Robbins* may derive some consolation from the fact that a year later the decision was overruled in United States v. Ross, 456 U.S. 798 (1982). For a thoughtful analysis of these three cases, *see* Comment, *The Expanding Scope of Warrantless Automobile Searches*: United States v. Ross, 20 SAN DIEGO L. REV. 457 (1983).

the field are required to make quick decisions on whether the requisite probable cause exists to support an arrest or a search. Arguably, it is wrong to penalize, through the suppression of probative evidence, the officer's reasonable mistakes which a judge in hindsight deems to be unconstitutional.

The courts have engendered a state of uncertainty with regard to fourth amendment standards. Fourth amendment adjudications inevitably leave "much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when [the Supreme Court] divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest."[54] The exclusionary rule is least efficacious in deterring police misconduct in these "grey, twilight area[s], where the law is difficult for courts to apply, let alone for the policeman on the beat to understand."[55] A good faith exception recognizes these difficulties and attempts to resolve them through an objective and subjective analysis of the police officer's actions.

Such a good faith exception to the exclusionary rule was first articulated and rationalized by Justice White in his dissenting opinion in *Stone v. Powell*.[56] According to Justice White, when an officer conducts an unreasonable search or seizure under the mistaken, though good faith, belief that it was constitutional, the evidence should be admitted. He noted, however, that under the current exclusionary rule, evidence recurringly "is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule."[57]

Justice White proposed that the Court adopt a good faith exception to the exclusionary rule which would take these factors into consideration. According to his proposal, a prosecutor must satisfy a two-prong test to avoid exclusion of evidence seized by an unreasonable search or seizure. First, the prosecuting attorney must show that the seizing officer had a good faith belief that his conduct comported with existing law.[58] Second, he must demonstrate that the officer had reasonable grounds for his belief.[59]

The first appellate decision to adopt a good faith exception was *United States v. Williams*,[60] an en banc decision by the Fifth Cir-

54. Stone v. Powell, 428 U.S. at 540 (White, J., dissenting).
55. Schneckloth v. Bustamonte, 412 U.S. 218, 269 (1973) (Powell, J., concurring).
56. 428 U.S. 465 (1975).
57. *Id.* at 538 (White, J., dissenting).
58. *Id.*
59. *Id.* His actions should be determined on the basis of how an officer of reasonable prudence would have acted under the circumstances, and whether he had reasonable grounds for acting as he did.
60. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

cuit. In *Williams*, the defendant had been convicted of possession of heroin and released on bail[61] on the condition that she remain in Ohio. She was arrested in Atlanta by a federal agent who knew of the travel restriction. During her arrest, the agent discovered that she was carrying heroin.[62] At trial, the district court granted her motion to suppress the seized heroin on the ground that she had been illegally arrested.

The Fifth Circuit reversed the district court and unanimously held the heroin should have been admitted. In one majority opinion, sixteen judges held that Williams had been lawfully arrested for violating a condition of her bail release.[63] More significantly, the second majority opinion by thirteen judges 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."[64]

The *Williams* court recognized two situations in which the good faith exception would be applicable: "technical violations" and "factual mistakes."[65] These two situations correspond to what are known in criminal law as "mistakes of law" and "mistakes of fact." The court reasoned:

> 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."[66]

The court concluded that whenever either of these two situations arises, "[a]ny slight deterrent effect of excluding fruits of good-faith arrests is even less than the small deterrence"[67] which the Supreme Court had, in previous cases, concluded "does not justify the societal harm incurred by suppressing relevant and incriminating evidence."[68] Thus, the court concluded, if no deterrent purpose is to be achieved by excluding good faith evidence, then the exclusionary

61. *Id.* at 833.
62. *Id.* at 834.
63. *Id.* at 836-39.
64. *Id.* at 840.
65. *Id.* at 841; such a definition was first proposed by Edna F. Ball, and was relied on by the court and incorporated into its opinion. *See* Ball, *supra* note 25.
66. *Id.* at 841 (quoting Ball, *supra* note 25, at 638-39).
67. *Id.* at 842.
68. *Id.* at 843.

rule should not be applied.

Although the concept of a good faith exception is alluring, it is not a panacea for all of the ills which plague the exclusionary rule; nor is it without its own detractors.[69]

The primary arguments against a good faith exception are threefold. First, opponents claim it would "put a premium on the ignorance of the police officer and, more significantly, on the department which trains him."[70] Second, it would halt judicial development of fourth amendment rights.[71] And finally, it would "insulate important areas of police misconduct from judicial oversight and control."[72] These criticisms must be answered if a workable good faith doctrine is to be adopted. The final section of the Comment will address these criticisms and propose a workable good faith exception to the exclusionary rule.

PROPOSAL FOR A WORKABLE GOOD FAITH EXCEPTION: PROSPECTIVE JUDGMENTS

As discussed in the preceding section, the good faith exception recognizes that it is wrong to penalize officers for actions taken in good faith and in the reasonable, though mistaken, belief that they are constitutional.[73] It further recognizes that the exclusionary rule should not be applied when the deterrent effect of exclusion does not outweigh the societal costs,[74] or no deterrent effect exists.[75]

The current good faith exception, as adopted in *Williams*, however, has a serious procedural omission which must be addressed by the courts. Although the procedure requires courts to undertake a two-prong subjective and objective analysis of a police officer's behavior, it fails to provide the officer with clearly articulated fourth amendment standards for future police conduct. In order for the courts to answer the criticisms against the good faith exception and implement a workable doctrine, the judiciary must develop proce-

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69. *See* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L. J. 365 (1981); 1 W. LA FAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 1.1-.2 (1978 and 1983 Supp.); Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. LAW & CRIMINOLOGY 875 (1982).

70. Kaplan, *Limits on the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044 (1974).

71. *See generally* Mertens & Wasserstrom, *supra* note 70; Oaks, *supra* note 24, at 678; *see also* Justice Brennan's dissent in United States v. Peltier, 422 U.S. 531, 554 & n.14 (1974).

72. *See* Mertens & Wasserstrom, *supra* note 70, at 425.

73. *See* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980)(en banc), *cert. denied*, 449 U.S. 1127 (1981).

74. *See* Stone v. Powell, 428 U.S. 465, 490-91 & n.29 (1975).

75. *See id.* at 540 (White, J., dissenting); *see also* United States v. Williams, 622 F.2d at 847.

dures to review and adjudge police actions which promote evolution of fourth amendment law and deter police misconduct. This may be accomplished by instituting prospective judgments in suppression hearings at the trial court level.

Problems with the Current Good Faith Exception

As noted earlier, under the *Williams* good faith exception, a police officer must satisfy a two-prong test — i.e., he must demonstrate that his actions were taken in both subjective and objective good faith — if his unconstitutionally seized evidence is to be admitted.[76] The subjective element ensures that police officers do not willfully abuse an individual's rights;[77] the objective element requires that police conduct comply with established fourth amendment standards.[78]

Under the *Williams* analysis, however, an officer's reasonableness is not translated into articulable standards for future police conduct. In order to deter police officers from performing unreasonable searches and seizures, they must be told what actions will be deemed to be unreasonable in the future. The *Williams* analysis fails to bridge this procedural gap between constitutional theory and practical application.

The issue before the *Williams* court was whether the Drug Enforcement Agency (DEA) agent who arrested Williams had statutory authority to make a warrantless arrest for a violation of a bond condition committed in his presence.[79] The first majority decision of the court concluded that the DEA agent had conducted a legal search and seizure and that the drugs should be admitted.[80]

The second majority opinion agreed that the seized drugs should have been admitted, but on different grounds. According to this decision, suppression of the drugs "was wrong whether or not Williams'

76. *See* United States v. Williams, 622 F.2d at 841 nn.4-4a.

77. Generally, the only evidence offered on the subjective good faith question is the officer's own testimony; and "[s]uch testimony, whether truthful or perjured, is almost impossible to refute." *See* Ball, *supra* note 25, at 655. However, this is not to say that the courts should simply make a cursory examination of the subjective good faith of the officer's actions. A court could, for example, examine the officer's records to see if they demonstrate a consistent pattern of behavior which often resulted in suppression of his evidence. Under such circumstances, the court would be justified in finding that the officer acted in bad faith and that the evidence should be suppressed. In fact, two commentators have argued that a close look at the record of the agent whose conduct was reviewed in *Williams* reveals that he may not have acted in good faith. *See* Mertens & Wasserstrom, *supra* note 70, at 417-23.

78. United States v. Williams, 622 F.2d at 841 n.4a.

79. *Id.* at 836.

80. *Id.* at 839.

violation of a bond condition was such a crime as warranted her arrest and the consequent search of her person that revealed their presence."[81] The court held that evidence is not to be suppressed when it is seized in good faith by an officer under the mistaken, though reasonable, belief that his actions were constitutional.[82]

Three flaws exist in the analysis expressed in the second majority opinion. First, the court does not adequately determine whether the officer's actions were constitutionally mandated, or as in this case, legally authorized. Second, the court does not sufficiently explain why the officer's actions were reasonable under the circumstances.[83] And finally, the court does not effectively articulate fourth amendment standards for future police conduct.

Without clearly articulated standards to govern their conduct, officers will not be deterred from taking similar actions in the future. Thus, by failing to articulate fourth amendment standards which would deter future police misconduct, the court has halted the development of fourth amendment law in this area and encouraged ignorance by other law enforcement officers.

Prospective Judgment Procedure

The above analysis of *Williams* demonstrates the need for a procedure by which the courts can institute a good faith exception to the exclusionary rule while simultaneously preserving the rule's deterrent effect and promoting development of fourth amendment principles. A prospective judgment procedure would effectively achieve these dual goals.

Under the prospective judgment procedure, trial courts would adjudicate fourth amendment issues before evaluating a possible good faith exemption argument.[84] After deciding the constitutionality of

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81. *Id.* at 840.

82. *Id.*

83. The court did not explain what it considered to be unreasonable conduct under the circumstances. Instead, it confined its definition of "reasonableness" to a footnote, merely stating the conclusion that the officer's actions were reasonable under the circumstances. *Id.* at 841 n.4a. Such a conclusion provides little guidance to law enforcement administrative agencies responsible for formulating police procedures in accordance with the decision, or to police officers who must comply with these procedures.

84. In United States v. Leon, 52 U.S.L.W. 5155, 5162 (U.S. July 5, 1984) (No. 82-1771), the Court suggests that application of a good faith exception to searches conducted pursuant to an invalid warrant does not preclude the lower court from reviewing the constitutionality of the search or seizure. The Court noted that "[i]f the resolution of a particular fourth amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue. *Id.* (footnote omitted). *But see id.* at 5176 n. 35 (Brennan, J., and Marshall, J., dissenting)(argued that a proceeding in which "a court would declare that the Constitution had been violated but that it was unwilling to do anything about it, seems a mockery").

The proposed prospective judgment procedure would institute a constitutional review

the officer's conduct, the trial judge would then determine whether the police officer's actions were in good faith and comported with what should be expected of a reasonable, well-trained law enforcement officer.[85] The evidence would not be suppressed if the court finds that although a fourth amendment right has been violated, the officer acted under a reasonable, though mistaken, legal or factual belief that his conduct was constitutional. After ruling on the suppression motion, the court would issue a prospective judgment, based on its initial analysis of the fourth amendment violation. This judgment would delimit future permissible police conduct within the court's jurisdiction and be directed not only toward counsel, but the police officer and the agency that trains him as well.

Prospective judgments would be informally directed toward future police conduct and would put police officers on notice that henceforth such conduct would be prohibited by the courts in that jurisdiction. Any subsequent arrest or search that violated a prior prospective judgment would not be exempted from the exclusionary rule simply because a police officer was unaware of or misinterpreted the pertinent case law.

Enforcement agencies would inform their personnel of the relevant fourth amendment law and the prospective judgments. Thus, copies of prospective judgments should be forwarded to the law enforcement officer's employing agency, the United States Attorney, the District Attorney, the City Attorney or County Counsel responsible for defending the employing agency in civil suits, the Public Defender's office and judges and magistrates within the reviewing court's jurisdiction. These decisions will assist the agencies in training their officers, and provide consistency in the interpretation of the law.

Thus, the police officer would remain responsible for knowing the clearly defined law, and the officer would be well advised to keep abreast of the latest developments in the law. Furthermore, the objective standard would preserve every incentive for law enforcement

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process, similar to that suggested by the Court in *Leon*, as a regular practice at suppression hearings. Adjudication of fourth amendment claims under this procedure, therefore, ultimately will provide consistency in the law and guidance to police and magistrates.

85. In *United States v. Leon*, the Supreme Court adopted an objective standard for determining the reasonableness of an officer's actions in executing a search or seizure. The Court emphasized that it did not include a subjective determination of the officer's good faith as part of its analysis. *Id.* at 5161 & n.20. This Comment, however, proposes that the reviewing court should conduct both an objective and subjective analysis of the officer's conduct in determining whether he acted under a reasonable, though good faith belief that his actions were lawful. *See infra* text accompany notes 97-99.

agencies to ensure that their officers remain aware of the development of fourth amendment law.

Law enforcement agencies are generally in a better position than the courts to translate the prospective judgments into meaningful and applicable standards which will govern future police behavior.[86] Through the implementation of institutional policies and officer training programs, the agencies are in the unique position to dictate and ensure further development of fourth amendment law. Their actions are checked because successful prosecutions will depend upon implementing policies which guarantee that their officers comply with the letter of the law as proposed by the prospective judgments.[87] The success of such institutional notification procedures and training programs for changes in search and seizure law have been well documented in certain limited contexts.[88]

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86. Police officers are more likely to respond to administrative policies developed by fellow law enforcement officials than they are to the courts. *See* J. SKOLNICK, *supra* note 53, at 225-29.

87. Justices Brennan and Marshall, in their dissent in *United States v. Leon*, noted that "the chief deterrent function of the [exclusionary] rule is its tendency to promote institutional compliance with fourth amendment requirements on the part of law enforcement agencies generally." 52 U.S.L.W. at 5170 (Brennan, J., and Marshall, J., dissenting). (footnote omitted). *See also* Dunaway v. New York, 442 U.S. 200, 221 (Stevens, J., concurring); Mertens & Wasserstrom, *supra* note 70, at 399-401. The proposed prospective judgment procedure maintains the rule's effectiveness as a "systemic" deterrent; it provides an impetus to police training programs to ensure that officers are aware of limits imposed by the fourth amendment and the need to operate within those limits.

88. Professors Mertens & Wasserstrom have noted the important deterrent effect that such departmental policies can have on officers.

> [E]ven 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 . . . . 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.

Mertens & Wasserstrom, *supra* note 70, at 399.

An excellent example of the effectiveness of procedural deterrence is the reaction of the District of Columbia Metropolitan Police to the Supreme Court's decision in Delaware v. Prouse, 440 U.S. 648 (1979). In *Prouse*, the Court struck down "random stops" of cars for license or registration checks in the absence of articulable suspicion of criminal activity. The District of Columbia Metropolitan Police had been conducting such stops, but after the Supreme Court delivered its decision, "[t]he Chief of Police issued an immediate telex message to his officers, advising them to desist from the practice" and then "incorporat[ed] 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." Mertens & Wasserstrom, *supra* note 70 at 400. Additionally, even before the Court ruled in *Prouse*, the Delaware State Police Legal Officer, in response to the trial court's ruling invalidating such stops, "had disseminated a memorandum to all troops and units within the State Police describing the decision, explaining the conduct prohibited, and advising that it did not affect stops based on articulable suspicion," and "provid[ing] several ex-

Opponents of the good faith exception claim it would halt the development of substantive fourth amendment law by removing the accused's incentive to appeal a trial court decision, absent factually identical precedent invalidating the search or seizure.[89] Arguably, this would deprive appellate courts of their only opportunity to analyze constitutional rights and guide both lower courts and law enforcement officials.[90] These opponents claim that this deprivation will effectively halt evolution of fourth amendment rights.

The prospective judgment procedure, however, would not curtail judicial development of fourth amendment law.[91] On the contrary, it would facilitate the articulation of fourth amendment standards. Under the proposed good faith rule, every challenge to a search or seizure would first require the trial courts to enunciate relevant constitutional standards.

Furthermore, the requirement of an initial constitutional determination may have a salutary effect in the courts.[92] Courts may feel freer to interpret the fourth amendment honestly and more liberally because the good faith exception will allow admission of probative evidence despite a finding of unconstitutionality; the exclusionary rule in the past may have caused courts to restrict their interpretation because of the realization that a broad and protective interpretation of the fourth amendment might cause dangerous criminals to be released.[93] Thus, a good faith exception gives the courts the opportunity to fully articulate and interpret the fourth amendment.

Finally, because the substantial windfall of exclusion would remain available to those defendants who could show unreasonable police conduct, it is unrealistic to assume that defendants with colora-

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amples of facts that could provide sufficient articulable suspicion for a stop." *Id.*

A number of other commentators have underlined the importance of written police rules in the governance of police conduct. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE — A PRELIMINARY INQUIRY (1971); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); Wright, *Beyond Discretionary Justice* (Book Review), 81 YALE L. J. 575 (1972).

89. United States v. Peltier, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting); *but see* Ball, *supra* note 25, at 655 (under good faith doctrine mere lack of clear precedent on identical facts would not automatically require denial of motion to suppress).

90. United States v. Peltier, 422 U.S. at 555 (*quoting* Oaks, *supra* note 24, at 756).

91. *See* United States v. Leon, 52 U.S.L.W. 5155, 5162 (U.S. July 5, 1984) (No. 82-1771).

92. *See* Bernardi, *supra* note 41; SKOLNICK, *supra* note 53. *See also* United States v. Leon, 52 U.S.L.W. at 5160 n.18.

93. *See* Bernardi, *supra* note 41, at 51. *See also* United States v. Leon, 52 U.S.L.W. at 5162 n. 26 (quoting Schroeder, *supra* note 25 at 1420-21).

bly meritorious claims of fourth amendment violations will lose their incentive to appeal.[94] Defendants will continue to have the opportunity to appeal the trial court's determination of the seizing officer's good faith. And in some jurisdictions, the defendant may file an interlocutory appeal and have the matter reviewed immediately. In either case, the appellate court will have the opportunity to review fourth amendment law and articulate constitutional standards for future search and seizure conduct.

Public defender's offices, and other organizations which regularly represent criminal defendants, would have considerable incentive to appeal a trial court's decision in such circumstances, not only for the sake of their present client but for those who they may represent in the future. Thus, "the chances seem slim indeed that a constitutional issue of some importance, as to which a judge-made change in law is a reasonable possibility, will not be raised and presented effectively."[95]

Practical Application of the Proposed Good Faith Exception

This subsection presents a hypothetical situation to analyze how a court would administer the exception, to show how a law enforcement agency would translate the court's judgment into a meaningful policy for the officer in the field, and to demonstrate that no matter how the trial court rules on a suppression motion, the defendant will still have the incentive to appeal fourth amendment issues.

Suppose an officer demonstrated sufficient probable cause and obtained a valid search warrant to search the defendant's home for narcotics. When the officer arrived at the defendant's home, he knocked at the front door and announced to persons inside that he sought to be admitted to discharge his duties. The defendant was located on the third floor of the three-story structure in a back bedroom and was unaware of the officer's presence. After a sufficient time elapsed, the officer broke in the front door of the premises and proceeded to the room where the defendant was located. Without again announcing his presence, the officer broke into the defendant's bedroom, executed the warrant, and during the course of his search discovered five ounces of cocaine.

Appearing before a federal district court, the defendant filed a motion to suppress the seized cocaine, claiming the officer conducted an unreasonable search and seizure because he failed to knock and announce his presence before entering the bedroom. In response to the motion, the prosecutor makes two claims. First, he claims that

94. United States v. Leon, 52 U.S.L.W. at 5162 n.25.

95. Beytagh, *Ten Years of Non-retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1614 (1975).

the search and seizure were not unreasonable. Alternatively, he contends the evidence should be admitted on the basis of the good faith exception to the exclusionary rule.

The court will engage in a two-step analysis in determining whether to suppress the evidence. First, the court must determine whether the officer's actions were unconstitutional. If the court determines that the officer fully complied with fourth amendment principles, the motion would be denied. Depending on the local rules in the jurisdiction, however, the defendant could file an interlocutory appeal and immediately have the constitutional question reviewed by the federal circuit court of appeals. This ensures that the appellate courts have the opportunity to develop fourth amendment law.

If the court determined that the officer's actions were unconstitutional — that the officer was required to knock and announce his presence at the second door — the court would consider the prosecution's good faith exception claim and begin the second step of its analysis. Within this second step are two related questions: first, whether the officer had a good faith belief that his conduct was lawful; and second, whether he had reasonable grounds to believe his conduct comported with existing law.[96]

In order to determine the officer's subjective good faith belief that his conduct was constitutional the court must look at the totality of the circumstances. Here the officer had probable cause, obtained a valid search warrant,[97] and knocked on the defendant's door and announced his presence. Additionally, he was operating under a reasonable, though mistaken, legal belief that his conduct was constitutional. Without any clearly defined search and seizure procedures to guide him, he acted as any reasonable officer would have acted under the circumstances.

Had the officer been relying on an administrative policy or a prior judicial decision which announced that an officer need only knock and announce his presence once when executing his duties, then the court would find his actions were reasonable.[98]

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96. *See supra* notes 85-86.

97. Arguably, application for a warrant would be prima facie evidence of the officer's subjective good faith. *See* Fitzhugh, *The New Exclusionary Rule Cases*, 70 A.B.A. J. 58, 60 (1984).

98. The proposed prospective judgment procedure is consistent with the Supreme Court's current analysis of retroactivity cases in which a police officer relied upon a prior judicial decision at law later found to be unconstitutional. Although the Court has been willing to conclude that new fourth amendment principles are *always* to have prospective effect, United States v. Johnson, 457 U.S. 537, 560 (1982), when confronted with a retroactivity problem in the context of the exclusionary rule, it has consistantly accorded

After examining the record, the court will determine whether to grant the prosecution the good faith exception and allow the evidence to be introduced. Coupled with this determination will be a prospective judgment delimiting the future conduct of police officers in like circumstances.[99]

If the court determines the officer's actions were unconstitutional but done in good faith, the motion to suppress would be denied. The court, however, would also issue a prospective judgment requiring all officers within the court's jurisdiction to thereafter knock and announce their presence a second time when confronted with a situation similar to the officer in the present case.

The prospective judgment would be forwarded to the officer's employing agency, the United States Attorney, the District Attorney, the City Attorney or County Counsel, and judges and magistrates, within the court's jurisdiction, all of whom would be charged with constructive knowledge of the court's decision. It therefore would be in their best interest to ensure that police officers and other law enforcement agents who must comply with the court's decision are informed immediately of the change in the law.[100]

The prospective judgment would reach only law enforcement agents within the court's jurisdiction. Thus, if a court in another jurisdiction were to determine a week later that a police officer is not required to knock and announce his presence a second time, the ruling would not affect officers within the first jurisdiction.

Because knowledge of the prospective judgment is imputed to officers within the court's jurisdiction, officers are required to alter their actions immediately. Thus, if an officer, one week after issuance of the prospective judgment, failed to announce his presence a second time under like circumstances, the prosecution could not make a good faith exception claim when a motion to suppress is made.

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any newly articulated principle which "marks a clear break with the past" prospective application *only*. *See* United States v. Peltier, 422 U.S. 244 (1979); Desist v. United States, 394 U.S. 244 (1969); Linkletter v. Walker, 381 U.S. 618 (1965).

In determining whether a new principle of law should be given retroactive effect, the Court has relied primarily upon three considerations: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovell v. Denno, 338 U.S. 293, 297 (1967). In assessing these three considerations, the Court has recognized that the policies underlying the exclusionary rule do not require retroactive application in cases where officers acted in good faith reliance upon administrative regulations. *See* Peltier, 422 U.S. at 536-38. Suppression of the evidence in such a situation would have no deterrent effect. *Id.* at 542.

99. *See supra* notes 86-9 and accompanying text.

100. For examples of hypothetical police-made rules, *see* Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective*, 10 PAC. L. J. 33, 58-61 (1978); Quinn, *The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights*, 52 U. DET. J. URB. L. 25, 44-54 (1974).

CONCLUSION

The foregoing hypothetical, and its accompanying analysis, illustrates that the courts can adopt a workable good faith exception to the exclusionary rule. This Comment concludes that a prospective judgment procedure would allow courts to remain free to decide significant unsettled questions of law or to adjudicate particularly problematic or recurring factual situations that give cause for concern. The accused, on the other hand, would still have the incentive to litigate a possible fourth amendment challenge. The police officer and enforcement agencies would be put on notice of substantive fourth amendment law, and would be encouraged to upgrade their continuing legal education programs. The adoption of a good faith exception coupled with a prospective judgment procedure would preserve the deterrent efficacy of the exclusionary rule while simultaneously recognizing that exclusion will not deter when a police officer acts under the reasonable though mistaken belief that his actions comported with the Constitution.

KELLY J. SALT