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The Exclusionary Rule Revisited: Good Faith in Fourth Amendment Search and Seizure

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I'm not a lawyer . . . . That's why I can see what the law is like. It's like a single bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling, and somebody is always going to nigh catch pneumonia . . . . The best you can do is do something and then make up some law to fit and by the time that law gets on the books you would have done something different.[1]

INTRODUCTION

Since its promulgation in *Weeks v. United States*,[2] lawyers, judges and legal scholars have grappled with the exclusionary rule, finding that this "single bed blanket" fails to cover the myriad of circumstances in which fourth amendment issues arise.[3]

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[1] ROBERT PENN WARREN, ALL THE KING'S MEN 136 (Bantam ed. 1980).

[2] 232 U.S. 383 (1914). *Weeks* established the general rule, applicable to federal officers and agents, that evidence seized in violation of an individual's fourth amendment rights is inadmissible in a federal criminal prosecution. The rule had its inchoate origin in Boyd v. United States, 116 U.S. 616 (1886). The United States Supreme Court initially declined to apply the exclusionary rule to the states in Wolf v. Colorado, 338 U.S. 25 (1949). However, alarmed by abuses of the fourth amendment, the Court reversed itself in Mapp v. Ohio, 367 U.S. 643 (1961), and required states to exclude illegally obtained evidence.

[3] Justice Powell, in his concurring opinion in Robbins v. California, 453 U.S. 420 (1981), voiced his sentiments about the operation of the exclusionary rule as follows:

> [T]he law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided. Much of this difficulty comes from the necessity of applying the general command of the Fourth Amendment to ever-varying facts; more may stem from the often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder.

Id. at 430.

Justice Powell's statement about the confusion generated by the exclusionary rule is ironic in light of the subsequent history of the holding in *Robbins*. A plurality in *Robbins* held that a police officer cannot make a warrantless search of garbage bags found in the trunk of an automobile. Less than a year later, the Court reversed itself by holding that police officers do not have to obtain a warrant to search containers found in a vehicle as long as they have legitimate grounds to stop the vehicle and probable cause to believe it contains contraband. United States v. Ross, -- U.S. --, 102 S. Ct. 2157 (1982).

There has been so much "pulling and hauling" at this blanket in order to meet individual privacy interests[4] protected by the fourth amendment,[5] and at the same time accommodate the practical needs of the criminal justice system, that the rule's vitality is seriously questioned.[6]

The United States Supreme Court has modified, limited and carved exceptions to the rule on numerous occasions,[7] and attor-

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[4] *Compare* Robbins v. California, 453 U.S. at 430, (Powell, J., concurring) ("a central purpose of the Fourth Amendment is to safeguard reasonable expectations of privacy") *and* Mapp v. Ohio, 367 U.S. at 655 (privacy is "implicit in the concept of ordered liberty") *with* United States v. Ross, -- U.S. at --, 102 S. Ct. at 2171 ("an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband") *and* United States v. Calandra, 414 U.S. 338, 347 (1974) ("[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim") *and* Linkletter v. Walker, 381 U.S. 618, 637 (1965) (exclusion of evidence does not restore the victim's privacy).

In Wilkey, *the Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215 (1978) it is suggested that the decreased emphasis on privacy in search and seizure cases is an expression of doubts "as to just what right of privacy guilty individuals have." *Id.* at 220.

[5] U.S. CONST. amend. IV states in full:

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

[6] Numerous commentators have been critical of the exclusionary rule. *See generally* S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964); Burns, Mapp v. Ohio: *An All-American Mistake*, 19 DE PAUL L. REV. 80 (1969); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 CHI. L. REV. 665 (1970); Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979); Wilkey, *supra* note 4; Wingo, *Growing Disallusionment with the Exclusionary Rule*, 25 SW. L.J. 573 (1971); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972); Comment, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 U. KAN. L. REV. 768 (1972).

Articles more favorable to the rule include Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1973-74); Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than an "Empty Blessing"*, 62 JUDICATURE 337 (1979) [hereinafter cited as *Historical Perspective*]; Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978) [hereinafter cited as *Interpretation*].

[7] See the text accompanying notes 33-50 *infra* for a discussion of United States Supreme Court decisions that have restricted the scope and application of the exclusionary rule.

neys and judges must be on their toes to stay current with these developments. The Kentucky Court of Appeals in *Richmond v. Commonwealth*[8] recently followed the approach taken by other jurisdictions[9] by applying yet another exception—the "good faith" doctrine. Under this doctrine, evidence will not be excluded when "discovered by officers in the course of actions taken in good faith and in the reasonable, though mistaken, belief that they were authorized"[10] to make the search.

Although the Kentucky Supreme Court affirmed the judgment of the court of appeals, it did so on different grounds.[11] Because this issue probably will be raised again, this Comment will examine the development of the good faith exception and its underlying rationale. The discussion will focus on recent United States Supreme Court decisions that limit and modify the exclusionary rule. These decisions reveal that the Court does not consider the rule to be coextensive with fourth amendment rights. Next, this Comment analyzes state and lower federal court decisions that have considered the good faith doctrine, concluding that it is a theoretically sound doctrine that can balance the practical difficulties of police officers in the course of making a search and seizure against the right of citizens to be free from fourth amendment violations. The author nonetheless cautions that the application of the good faith doctrine must be made with its primary purpose in mind: evidence may be admitted only when police officers could not have been deterred from making a fourth amendment violation because they were acting reasonably and in good faith.

I. DEVELOPMENT OF THE GOOD FAITH DOCTRINE

A. *Justifications for the Exclusionary Rule*

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[8] 28 Ky. L. Summ. 10, at 17 (Ky. Ct. App. Aug. 12, 1981) [hereinafter cited as KLS], *aff'd*, 29 KLS 10, at 17 (Ky. Aug. 31, 1982).

[9] The Kentucky Court of Appeals relied primarily upon United States v. Williams, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981) and People v. Adams, 439 N.Y.S.2d 877 (1981). For a discussion of these cases, see the text accompanying notes 51-60 *infra*.

[10] 28 KLS 10, at 18.

[11] See note 62 *infra* for a discussion of the grounds used by the Kentucky Supreme Court.

The justifications and rationales which have been forwarded in support of the exclusionary rule have changed in degree and emphasis over the years, thus playing a significant role in the development of the good faith doctrine. In *Mapp v. Ohio*,[12] the Supreme Court set forth an all-encompassing rule whereby "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[13] Noting that the states had been unable to secure fourth amendment rights by alternative means,[14] the Court concluded

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[12] 367 U.S. 643 (1961).

[13] *Id.* at 655. It is interesting to note that the Court makes this all-or-nothing statement about the application of the rule immediately following a description of the flagrancy of the violation. The officers in *Mapp* forcibly entered the defendant's residence without a warrant, "[r]unning roughshod" over her. *Id.* at 645.

One commentator argues that the extreme nature of the violation in *Mapp* led the Court to establish "a rule of law created not to fit the facts before the Court (a judicial function), but rather to solve the many enforcement problems presented by the fourth amendment (a legislative function)." 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, 348-49 n.95 (1976).

[14] 367 U.S. at 651-53. A wealth of commentators have suggested alternatives to the exclusionary rule.

For a look at civil remedies as alternatives, *see, e.g.*, Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 717-22 (1974); Foote, *Tort Remedies for Police Violation of Individual Rights*, 39 MINN. L. REV. 493 (1955); McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 266, 268 (1961); Oaks, *supra* note 6, at 717-18; Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 387 (1939); Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & AD. 36 (1973); Taft, *Protecting the Public From* Mapp v. Ohio *Without Amending the Constitution*, 50 A.B.A. J. 815, 817 (1964); Wingo, *supra* note 6, at 581.

A review board also has been suggested. *See, e.g.*, Burger, *supra* note 6, at 15; Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board*, 30 WASH. & LEE L. REV. 223 (1973); Wingo *supra* note 6, at 580-81.

One commentator has suggested the use of an ombudsman. *See* Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH. L. REV. 317 (1973).

For a look at how other countries treat illegally obtained evidence, *see, e.g.*, Clemens, *The Exclusionary Rule Under Foreign Law: Germany*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 277 (1961); Cohn, *The Exclusionary Rule Under Foreign Law: Israel*, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 282 (1961); Kamisar, *Are Comparisons With Other Countries Meaningful?*, 62 JUDICATURE 348 (1979); Oaks, *supra* note 6, at 702-03, 705-06; Wilkey, *Do Other Countries Exclude Illegally-Seized Evidence?*, 62 JUDICATURE 216 (1978).

that the exclusionary rule was "part and parcel" of the Constitutional prohibition against unreasonable searches.[15]

Shortly after *Mapp*, the Court abandoned the proposition that the rule was constitutionally based and instead justified the rule by perceiving it as serving twin goals[16]—the deterrence of illegal searches and seizures by removing the incentive to violate fourth amendment rights,[17] and the protection of the "imperative of judicial integrity."[18] As the exclusionary rule continued to evolve, the judicial integrity rationale lost its forcefulness in fourth amendment analysis, coming to be viewed as merely "an assimilation of the more specific rationales . . . [which] does not in their absence provide an independent basis for excluding challenged evidence."[19] While its vitality was said to have been "restored" in *United States v. Peltier*,[20] the Court today regards the exclusionary rule as a judicially created remedy,[21] and through the use of a balancing test, suppresses improperly obtained evidence only when the deterrence purposes of the rule will be served.[22]

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[15] 367 U.S. at 651. The issue as to whether the exclusionary rule is constitutionally based frequently arises among commentators. A brief but helpful discussion of this issue can be found in *Interpretation, supra* note 6, in which the author argues that the rule is mandated by the Constitution. Justice Brennan is one of the few current members of the Court who believes that the exclusionary rule is coextensive with the fourth amendment. *See* United States v. Peltier, 422 U.S. 531, 550-62 (1975) (Brennan, J., dissenting). Further discussion may be found in Schrock and Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978); Yarbrough, *The Flexible Exclusionary Rule and the Crime Rate*, 6 AM. J. CRIM. L. 1 (1978).

[16] *See* Brown v. Illinois, 422 U.S. 590, 599 (1975); United States v. Peltier, 422 U.S. at 535-38; Terry v. Ohio, 392 U.S. 1, 12-13 (1968); Wong Sun v. United States, 371 U.S. 471, 486 (1963).

[17] *See* Stone v. Powell, 428 U.S. 465, 482 (1976); United States v. Peltier, 422 U.S. at 536-39; United States v. Calandra, 414 U.S. at 347-48; Alderman v. United States, 394 U.S. 165 (1969); Terry v. Ohio, 392 U.S. at 29; Tehan v. United States, 382 U.S. 406, 413 (1966); Linkletter v. Walker, 381 U.S. at 637.

[18] Mapp v. Ohio, 367 U.S. at 660. *See also* Elkins v. United States, 364 U.S. 206, 220 (1960).

[19] Michigan v. Tucker, 417 U.S. 433, 450 n. 25 (1974).

[20] 422 U.S. at 553 n.13 (Brennan, J., dissenting).

[21] Stone v. Powell, 428 U.S. at 482; United States v. Calandra, 414 U.S. at 348.

[22] Brown v. Texas, 443 U.S. 47, 50-51 (1979); Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979); Dunaway v. New York, 442 U.S. 200, 209-10 (1979); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

B. *Criticisms of the Exclusionary Rule*

The exclusionary rule has been the subject of a flood of criticism since its adoption in *Weeks* and its subsequent application to the states in *Mapp*.[23] Those who argue that it is the only viable method of deterring fourth amendment violations[24] are met with complaints that the rule is ineffective[25] and encourages police perjury.[26] Without empirical data to support its deterrence pur-

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Although one commentator believes the rule fails as a direct deterrent of illegal police conduct, he nonetheless asserts that it serves two vital functions: (1) It is a measureable consequence of a fourth amendment violation, and (2) it provides occasion for judicial review of police conduct. Oaks, *supra* note 6, at 755-56. Thus, even though there is no direct deterrence,

> [b]y demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies.

Id. at 756.

[23] See note 6 *supra* for a general list of commentaries criticizing the rule.

[24] Mapp v. Ohio, 367 U.S. at 651-52 dealt with the difficulties states had in trying to find alternative means to protect fourth amendment rights. The Court relied primarily upon California's experience and its adoption of the exclusionary rule in People v. Cahan, 282 P.2d 905 (1955). Several commentators have suggested that the rule itself hampers effective development of alternatives. *E.g.*, Oaks, *supra* note 6, at 753; Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. & POL. SCI. 255, 257 (1955). Some Supreme Court Justices have argued that the rule is inflexible and prevents states from dealing with fourth amendment problems according to their own unique circumstances. *See* Stone v. Powell, 428 U.S. at 500 (Burger, J., concurring); Mapp v. Ohio, 367 U.S. at 681 (Harlan, J., dissenting).

[25] The Supreme Court has noted that the efficacy of the rule has been questioned by commentators. *E.g.*, Stone v. Powell, 428 U.S. at 492 n.32; Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 411-422 (Burger, C.J., dissenting) (1970); United States v. Elkins, 364 U.S. at 218; Irvine v. California, 347 U.S. 128, 135 (1954). *But see* Terry v. Ohio, 392 U.S. at 12.

Empirical studies have been inconclusive. *See generally* Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62, 4 CRIM. L. BULL. 549 (1968); Canon, A Postscript on Empirical Studies and the Exclusionary Rule,* 62 JUDICATURE 455 (1979); Canon, *supra* note 6; Nagel, *Testing the Effects of Excluding Illegally Seized Evidence,* 1965 WIS. L. REV. 283; Oaks, *supra* note 6; Schlesinger, *The Exclusionary Rule: Have Proponents Proven That it is a Deterrent to Police?,* 62 JUDICATURE 404 (1979); Spiotto, *An Empirical Study of the Exclusionary Rule and Its Alternatives,* 2 J. LEGAL STUD. 243 (1973); Comment, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases,* 4 COLUM. J.L. & SOC. PROBS. 87 (1968).

[26] United States v. Janis, 428 U.S. 433, 447-48 n.18 (1976). The consequences of the exclusionary rule upon police perjury have also been discussed in Garbus, *Police Perjury:*

poses, the rule is said to operate at a high cost to society.[27] It is contended that, instead of protecting judicial integrity, the rule actually erodes public confidence in the fact-finding process when used to exclude probative evidence.[28]

Critics also argue that the rule operates only when police have, in fact, found incriminating evidence, and does nothing to deter police from making illegal searches purely for harassment purposes.[29] Some commentators suggest that the exclusionary rule hampers gun control.[30]Others complain of the rule's inflexibility since it fails to take into account the seriousness of the crime.[31] Further, critics charge that the rule operates arbitrarily by failing to recognize differences between flagrant and mild abuses of fourth amendment rights.[32]

An Interview with Martin Garbus, 8 CRIM. L. BULL. 363 (1972); Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).

[27] Wilkey, *supra* note 4, at 215. Judge Wilkey of the United States Court of Appeals for the District of Columbia writes: "The questionable justification for such a rule is all the more apparent when we realize that it represents, not a constitutional mandate, but a policy choice by our Supreme Court." *Id.*

[28] *Id.* at 223. Judge Wilkey writes: "I submit that the exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system." *Id.*

[29] Wright, *supra* note 6, at 737.

[30] Wilkey, *How the Exclusionary Rule Hampers Gun Control*, 62 JUDICATURE 224 (1978); *Contra, Historical Perspective, supra* note 6, at 342-43.

[31] Kaplan, *supra* note 6, at 1046; Schlesinger, *supra* note 25, at 405; Wilkey, *supra* note 4, at 226.

[32] In calling for an alternative to the exclusionary rule, Judge Wilkey wrote: "[I]t should be an objective of any substitute for the exclusionary rule to introduce comparative values into what is now a totally arbitrary process and inflexible penalty. Under the exclusionary rule, the 'penalty' is the same irrespective of the offense." Wilkey, *supra* note 4, at 228.

The American Law Institute's MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § SS 290.2 (Proposed Official Draft, 1975) would require a court to consider a number of factors before determining whether illegally-seized evidence should be suppressed in federal criminal prosecutions. Earlier versions of this draft were introduced into the United States Senate in 1971 and 1973. S. 2657, 92d Cong., 1st sess., 117 CONG. REC. 35,183 (1971); S. 881, 93d Cong., 1st sess., 119 CONG. REC. 4195 & 10,973 (1973).

Senator Bentsen, the bill's sponsor, explained the operation of the proposal as follows:

> In determining whether to admit or suppress certain evidence, the court would consider such factors as the extent to which the violation was willful, the extent to which it deviated from sanctioned conduct, and the extent to which it invaded the privacy of the defendant or prejudiced the de-

C. *Limits on the Operation of the Exclusionary Rule*

Along with the commentators just discussed, the United States Supreme Court has expressed discontent with the operation of the exclusionary rule and has restricted the scope of the rule's operation in several contexts. The foundation for subsequent limitations can be found in *United States v. Calandra*,[33] in which the Court held the exclusionary rule inapplicable to grand jury proceedings. In so holding, the Court emphasized that the exclusionary rule is a judicially-created remedy rather than a personal right of redress.[34] It further reasoned that the "prime purpose" of the rule is deterrence,[35] and "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best."[36]

A balancing of the deterrent effect of the rule against the costs of excluding valid evidence also was done in *Michigan v. Tucker*,[37] a case involving a *Miranda* violation under the fifth amendment.[38] The questioning of the defendant in *Tucker* was performed prior to the Court's decision in *Miranda*. Noting that it was an unrealistic burden to expect a police officer to anticipate the *Miranda* decision,[39] the Court observed that the exclusionary rule assumes that "police have engaged in willful, or at the very least negligent, conduct . . . ."[40]

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fendant's ability to defend himself.

Other factors to be considered would be the extent to which suppression would deter such violations in the future and whether the evidence seized would have been discovered despite the violation.

117 CONG. REC. 35,184 (1971).

[33] 414 U.S. 338 (1974).

[34] *Id.* at 348.

[35] *Id. Accord*, Linkletter v. Walker, 381 U.S. at 637.

[36] 414 U.S. at 351.

[37] 417 U.S. 433 (1974).

[38] The relationship between the fourth and fifth amendments has been discussed in several Supreme Court decisions, beginning with Boyd v. United States, 116 U.S. at 616. Both amendments provide an "independent ground for suppression." Brown v. Illinois, 422 U.S. at 606 n.1 (Powell, J., concurring). For a further look at their relationship, *see* Wong Sun v. United States, 371 U.S. at 471; Mapp v. Ohio, 367 U.S. at 646 n.5.

[39] 417 U.S. at 446 ("The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.").

[40] *Id.* at 447.

A similar approach was used in *United States v. Peltier*,[41] a case involving the constitutionality of border searches conducted without probable cause. The Court declined to apply the exclusionary rule retroactively when the officer was acting in the good faith belief that his conduct conformed with constitutional requirements. Exclusion of the illegally-seized evidence would not have deterred the police officer, the Court reasoned,[42] and inclusion of the evidence would not offend judicial integrity.[43]

Proponents of the good faith doctrine find further support in Justice Powell's concurring opinion in *Brown v. Illinois*.[44] He made a distinction between "flagrantly abusive" fourth amendment violations and "technical violations,"[45] and observed that "[b]etween these extremes lies a wide range of situations that defy ready categorization."[46] According to Justice Powell, a careful analysis would be required in each case to determine whether the

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[41] 422 U.S. at 531.

[42] *Id.* at 542. 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.

Id.

The search involved in *Peltier* occurred four months prior to the Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), in which the Court held a warrantless search conducted 70 miles from the Mexican border and without probable cause to be unconstitutional.

[43] 422 U.S. at 537. The Court explained:

> [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.

Id.

[44] 422 U.S. at 590. The narrow holding of the majority dealt solely with whether *Miranda* warnings in and of themselves would purge the taint of a confession made after an illegal arrest. The majority followed the "totality of the circumstances" approach set forth in United States v. Wong Sun, 371 U.S. at 471. Under this test, the circumstances of the case are evaluated to determine if the deterrence purposes of the rule will be met. The majority did not explicitly consider the good faith of the officers, but nonetheless stated that the "purpose and flagrancy of the official misconduct" were relevant factors. 422 U.S. at 604.

[45] *Id.* at 609-12.

[46] *Id.* at 612.

deterrence purposes of the exclusionary rule would be served.[47] The question in such an analysis would be whether the officers reasonably believed their conduct was constitutional.[48]

In the more recent case of *Rawlings v. Kentucky*,[49] Justice Rehnquist, writing for the majority, stated that "*Brown* mandates consideration of the purpose and flagrancy of the official misconduct" before a court can decide whether to exclude the fruits of a search and seizure which violates the fourth amendment.[50] In sum, the Court has declined to view the exclusionary rule as coextensive with the fourth amendment.

D. *Adoption of the Good Faith Doctrine*

As the foregoing analysis illustrates, the Court has limited the application of the exclusionary rule in a number of contexts, but has yet to explicitly adopt the good faith doctrine.[51] Nonetheless, lower state and federal courts, anticipating that its adoption is near, have attempted to delineate the good faith exception's boundaries and to define its requirements. Reliance has been placed primarily upon *United States v. Williams*,[52] a 1980 *en*

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[47] *Id.*

[48] *Id.* at 612-13.

[49] 448 U.S. 98 (1980).

[50] *Id.* at 109. The Court ruled that "the conduct of the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's statements." *Id.* at 110.

[51] At least four members of the Court, Justices Powell, Rehnquist, White and Chief Justice Burger, have advocated the good faith doctrine. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978). It has been reported that recently-appointed Supreme Court Justice Sandra Day O'Connor favors admission of relevant evidence obtained by police officers who, at the time of the search, were unaware that the search and seizure was unconstitutional. Lexington Herald-Leader, Sept. 12, 1981, at A4, col. 2.

However, in the recent 5-4 decision of Taylor v. Alabama, 50 U.S.L.W. 4783, (June 23, 1982), the Court was asked to recognize a good faith exception to the exclusionary rule but declined to do so. The Court's basis in reversing the conviction of a robbery suspect was that the defendant's confession should have been suppressed as the fruit of an illegal arrest. Writing for the majority, Justice Marshall based the decision upon Dunaway v. New York, 442 U.S. at 200 and Brown v. Illinois, 422 U.S. at 590. Justice Marshall did not analyze or evaluate the good faith exception, but merely stated: "To date, we have not recognized such an exception, and we decline to do so here." *Id.* at 4785. The dissent, written by Justice O'Connor and joined by Justices Powell and Rehnquist and Chief Justice Burger, did not discuss the good faith doctrine.

[52] 622 F.2d 830 (5th Cir. 1980).

banc decision of the Fifth Circuit Court of Appeals.

Jo Ann Williams was arrested in Georgia for violating a court order requiring her to stay in Ohio. A small amount of heroin was seized in a search incident to the arrest, and a larger quantity was found in her luggage in a search performed after the arresting officer obtained a search warrant. Williams claimed that her arrest was illegal because only a court, and not a field officer, can initiate contempt charges based upon a violation of a court order. The court of appeals disagreed, holding that a police officer has the authority to make a warrantless arrest for the violation of a court order which occurs in his presence.[53]

The court of appeals provided alternative grounds for its decision. The court held that even if the arrest was illegal, the heroin would not be suppressed because the police officer was acting in the good faith belief that his conduct was constitutional.[54] The good faith analysis in *Williams* is consistent with the balancing approach taken by the United States Supreme Court in other contexts; the court, in determining the propriety of excluding probative evidence which has been improperly obtained, considers whether the deterrent effect on illegal police conduct as the result of exclusion is sufficient to overcome the cost to society of suppressing this evidence.[55]

Noting that the Supreme Court "has restricted the application of the rule so that it is not now—if it ever was—coextensive with the fourth amendment,"[56] the court stated that "[a]nalyt-

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[53] *Id.* at 839. The defendant's motion to suppress was granted by the United States District Court for the Northern District of Georgia. That decision was initially affirmed by a three-judge panel of the court of appeals. United States v. Williams, 594 F.2d 86 (5th Cir. 1979). The present case reversed the latter decision upon a rehearing *en banc*.

[54] *Id.* at 840.

[55] For a discussion of these cases, see the text accompanying notes 33-50 *supra*.

[56] 622 F.2d at 841. In support of this proposition, the court of appeals listed not only *Peltier*, *Tucker* and *Calandra*, but also Michigan v. DeFillippo, 443 U.S. at 31 (exclusionary rule not applied when a statute was subsequently declared unconstitutionally vague); United States v. Caceres, 440 U.S. 741 (1979) (rule not applied to evidence obtained in violation of electronic eavesdropping regulations); Rakas v. Illinois, 439 U.S. 128 (1978) (fourth amendment rights cannot be asserted vicariously); United States v. Ceccolini, 435 U.S. 268 (1978) (exclusionary rule invoked with greater reluctance where fruit of the illegality leads to a live witness); Stone v. Powell, 428 U.S. at 465 (rule not applicable to habeas corpus proceedings); United States v. Janis, 428 U.S. at 433 (rule not applicable to civil proceedings for the collection of taxes); Harris v. New York, 401 U.S. 222 (1971) (illegally obtained evidence could be used to impeach defendant's credibility).

ically, it matters little whether reasonable, good-faith police actions be viewed simply as beyond the reach of the rule or as constituting an exception to its application. Since numerous writers and judges have employed the latter formulation, we shall do so here."[57]

The New York Court of Appeals took a somewhat different analytical approach in *People v. Adams*.[58] The police officers in *Adams* mistakenly believed they had a third party's consent to search the defendant's apartment. Rather than relying on an "exception" to the exclusionary rule, the court stated that a reasonable, yet mistaken, good-faith belief that a search is legal does not violate the fourth amendment prohibition against "unreasonable" seizures.[59] In denying the defendant's motion to suppress, however, the court did not rest its holding entirely on this analysis, implying that even if the search was unreasonable, the deterrence purposes of the exclusionary rule would not be served by excluding the evidence.[60]

In *Richmond v. Commonwealth*,[61] the Kentucky Court of Appeals relied primarily on *Williams* and *Adams* in affirming the denial of the defendant's motion to suppress. In *Richmond*, police officers had searched the defendant's vehicle after obtaining a search warrant from a magistrate in a nearby county and found a packet of cocaine. The defendant claimed that the fruits of the search should be suppressed because the magistrate, being in a different county, did not have the proper authority to issue the

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[57] 622 F.2d at 840.

[58] 439 N.Y.S.2d 877 (1981).

[59] *Id.* at 880-81.

[60] *Id.* at 881. The court stated:

> We would agree that where the searching officers rely in good faith on the apparent capability of an individual to consent to a search and the circumstances reasonably indicate that that individual does, in fact, have the authority to consent, evidence obtained as the result of such a search should not be suppressed. Application of the exclusionary rule in such instances of reasonable, good faith reliance by the police would do little in terms of deterring misconduct by the authorities in furtherance of the protections afforded by the Fourth Amendment.

Id.

[61] 28 KLS 10, at 17 (Aug. 12, 1981).

warrant.[62]

The court of appeals found the defendant's argument unpersuasive, stating:

> We are convinced that the facts of this case do not warrant the application of the exclusionary rule. There is no question here but that the officers acted reasonably and in good faith. There likewise is no suggestion that the magistrate who issued the warrant acted in bad faith. We simply hold here, limited to the facts of the case, that the application of the exclusionary rule, even if the search warrant was illegal, would do nothing to deter future police conduct taken in the reasonable and good faith belief that the conduct was legal. Since there would be no deterrent effect, there is no reason for the application of the rule.[63]

Thus, the court based its analysis on the failure-to-deter theory, believing that a reasonable, good faith mistake calls for an exception to the exclusionary rule.

II. CAN THE GOOD FAITH EXCEPTION WITHSTAND CRITICISM?

A. *The Exception's Impact on Judicial Integrity*

The good faith exception has been criticized on a number of grounds, including its impact on judicial integrity. The criticism

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[62] The opinion of the court of appeals left unanswered the question of whether a magistrate has the authority to act outside his or her territorial limits. If courts always failed to address the underlying question of the legality of the officer's conduct, law enforcement personnel would be without adequate guidance as to how to make a constitutional search and seizure. Thus, a police officer faced with a similar situation as that found in *Richmond* would not know whether a search warrant signed by a magistrate in another county would be valid to make the search. This situation would raise an interesting question: Would the officer in the second case be acting reasonably and in good faith when making such a search if there is no authoritative word from the state's courts?

On appeal, the Kentucky Supreme Court dealt with this issue extensively, holding that magistrates have statewide jurisdiction to issue search warrants under Kentucky's Constitution. 29 KLS 10, at 18. The Court stated: "[i]t is clear from Const. Sec. 109 that there is but one District Court for the entire state. Hence all of its judges are members of the same court." *Id.* The Court further held that the affidavit submitted to the magistrate contained sufficient information to show probable cause.

[63] *Id.* at 18.

is that a "taint" is placed upon the judiciary whenever the exception provides a protective cloak to illegal police conduct.[64] Justice Brennan, perhaps the harshest critic of the erosion of the exclusionary rule, wrote in his dissent to the non-application of the exclusionary rule in *United States v. Peltier:*

> If a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it. This business of slow strangulation of the rule . . . would be indefensible in any circumstances. But to attempt covertly the erosion of an important principle over 61 years in the making . . . clearly demeans the adjudicatory function, and the institutional integrity of this Court.[65]

It may be more forcefully argued, however, that denying the criminal justice system of valid evidence because of a good faith error on the part of law enforcement officers creates even greater doubts as to the ability of the nation's courts to reach a correct determination in a criminal proceeding.[66]

Judicial integrity considerations are incorporated into the balancing approach that is inherent in the good faith exception to the exclusionary rule.[67] It has been stated that if police officers could not have been deterred because they were acting in the good faith belief their actions were constitutional, judicial integrity is unscathed by admitting the probative evidence.[68] Further, when the violation is reasonable and made in good faith, use of the evidence assures the public that the courts are not arbitrarily excluding highly probative evidence. On the other hand, when the fourth amendment violation is "flagrant" or "willful" or the

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[64] *E.g., Interpretation, supra* note 6, at 84; Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A. L. REV. 1129 (1973).

[65] 422 U.S. at 561-62 (Brennan, J., dissenting).

[66] Wilkey, *supra* note 4, at 223. On the other hand, respect for the nation's court systems may be tarnished when questionable evidence is admitted on the basis of "dangerously expanded notions of what is a legal search in order to admit evidence which judges are reluctant to suppress." Schlesinger, *supra* note 25, at 405.

[67] Michigan v. Tucker, 417 U.S. at 450 n.25.

[68] *See* Stone v. Powell, 428 U.S. at 485-86 n.23; United States v. Peltier, 422 U.S. at 537; United States v. Ajlouny, 629 F.2d 830, 840-41 (2d Cir. 1980); United States v. Reda, 563 F.2d 510, 511-12 (2d Cir. 1977) (per curiam), *cert. denied,* 435 U.S. 973 (1978).

officer "should have known" he was acting illegally, judicial integrity is protected only if the evidence is excluded.

B. *Considerations of Judicial Policy*

In his dissent in *Peltier*, Justice Brennan also argued that the seriousness of a fourth amendment violation should not be the basis for determining whether to exclude the improperly seized evidence, because the Constitution itself draws that line.[69] Brennan believes that courts should focus solely on whether there has been a constitutional violation; any inquiry into the officer's state of mind is unjustified.[70] Proponents of the good faith doctrine find this argument unconvincing, seeing it as a mere "emotional attachment" to the exclusionary rule.[71] They say the constitution fails to set out the proper remedy for a fourth amendment violation.[72] In sum, the constitutional argument is viewed as a mere statement of "preferred judicial policy,"[73] with the huge costs inflicted upon society by a strict application of the exclusionary rule requiring the introduction of comparative values into a suppression hearing.[74]

C. *Practical Difficulties of the Good Faith Doctrine*

In response to claims by proponents of the good faith doctrine that this new approach to fourth amendment issues shifts judicial inquiry back to a determination of the guilt or innocence

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[69] 422 U.S. at 551 (Brennan, J., dissenting).

[70] *Id.* at 552-53. Brennan argued: "[T]he test whether evidence should be suppressed in federal court has always been solely whether the Fourth Amendment prohibition against 'unreasonable' searches and seizures was violated, nothing more and nothing less." *Id.* at 553 n.11. *Accord,* Michigan v. DeFillippo, 443 U.S. at 43 (Brennan, J., dissenting) ("The ultimate issue is whether the State gathered evidence . . . through unconstitutional means.").

[71] Wilkey, *supra* note 4, at 217.

[72] *Interpretation, supra* note 6, at 68. The author of this article argues that although individuals are guaranteed the right to be free from unreasonable searches and seizures, the fourth amendment is not explicit as to what the consequences of a violation should be.

[73] Ball, *supra* note 51, at 655.

[74] Wilkey, *supra* note 4, at 228. *See also* United States v. Calandra, 414 U.S. at 355-56 n.11. The American Law Institute's MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES §§ SS 290.2 (Proposed Official Draft, 1975) explicitly sets forth factors to be considered before evidence will be suppressed.

of the defendant, critics of the doctrine have argued that, as a practical matter, the exception presents additional problems by adding yet another fact-finding operation to already overburdened trial courts.[75] This problem is compounded, the critics assert, because of the untrustworthiness of lower courts in giving a motion to suppress thoughtful consideration.[76] Although such criticisms concerning the manageability and practical consequences of the good faith exception are difficult to analyze due to the exception's relatively recent development and limited adoption, the critics' fears and allegations are unsubstantiated. While some increased burdens are likely, the pessimistic predictions of these critics cannot be borne out until trial courts have had sufficient opportunity to test the doctrine.[77]

In fact, an examination of cases which have already applied the good faith doctrine reveals that courts have not abused their discretion in meeting the interpretation problems that inevitably arise with the adoption of a new legal standard. These courts

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[75] *Interpretation, supra* note 6, at 84 n.112; Kaplan, *supra* note 6, at 1045.

The majority in *United States v. Peltier* responded to criticisms that lower courts would be so overburdened by a good faith doctrine that they would automatically deny a suppression motion as follows:

> Whether today's decision will reduce the responsibilities of district courts, as the dissent first suggests, or whether that burden will be increased, as the dissent also suggests, it surely will not fulfill *both* of these contradictory prophecies. A fact not open to doubt is that the district courts are presently required, in hearing motions to suppress evidence, to spend substantial time addressing issues that do not go to a criminal defendant's guilt or innocence.

422 U.S. at 543 n.13.

[76] *Interpretation, supra* note 6, at 84 n.112; Kaplan, *supra* note 6, at 1045.

[77] The good faith doctrine has been expressly considered in a number of state and federal courts with varying degrees of acceptance. *See, e.g.*, United States v. Alvarez-Porras, 643 F.2d 54 (2d Cir. 1981) (good faith effort to comply with warrant requirements will not result in suppression); United States v. Hill, 500 F.2d 315 (5th Cir. 1974) (technical error will not result in suppression); United States v. Nelson, 511 F. Supp. 77 (W.D. Tex. 1981) (good faith doctrine is inapplicable when police officers were acting unreasonably); United States v. Santucci, 509 F. Supp. 177 (N.D. Ill. 1981) (good faith of officials in complying with illegal procedures is insufficient to deny motion to suppress); United States v. Wyler, 502 F. Supp. 969 (S.D.N.Y. 1980) (good faith one factor to be used in considering a motion to suppress); United States v. Wynn, 11 M.J. 536 (ACMR 1981) (declining to apply good faith doctrine absent explicit Supreme Court approval); Burke v. Sonoma County, 113 Cal. Rptr. 801 (1974) (rule inapplicable when poice officer is acting in good faith and reasonably); People v. Pierce, 411 N.E.2d 295 (Ill. App. Ct. 1980) (bad faith of police lacking, therefore motion denied).

have emphasized that the good faith of the law enforcement officer must be objectively reasonable.[78] A purely subjective standard of good faith could create serious questions of abuse,[79] of course, but the doctrine is not as vague and misleading as its opponents assert.[80] A number of guidelines have been developed to determine what constitutes objective good faith, and limits on the operation of the rule have been established.

First, an officer may be charged with constructive knowledge that his or her conduct was illegal,[81] and no amount of subjective good faith could override that knowledge.[82] Although it has been argued that this principle of constructive knowledge is inconsistent with the good faith doctrine since one without

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[78] United States v. Peltier, 422 U.S. at 542. In United States v. Williams, 622 F.2d at 844, the court also applied an objective standard. *Accord,* Richmond v. Commonwealth, 28 KLS 10, at 18; People v. Adams, 437 N.Y.S.2d at 881.

[79] Note, *Exclusionary Rule: Good Faith Exception—The Fifth Circuit's Approach in* United States v. Williams, 15 GA. L. REV. 487, 502 (1981); Note, *Constitutional Law: Search and Seizure—The Role of Good Faith in Substantive Fourth Amendment Doctrine*—Michigan v. DeFillippo, 443 U.S. 31 (1979), 55 WASH. L. REV. 849, 850 (1980); Comment, *Fourth Amendment in the Balance—The Exclusionary Rule After* Stone v. Powell, 28 BAYLOR L. REV. 611, 627 (1976).

[80] *See, e.g.,* United States v. Alvarez-Porras, 643 F.2d at 54. The Second Circuit Court of Appeals held:

> [W]e reach this decision [not to exclude] without embracing or rejecting the terms, "inevitable discovery" and "good faith," as exceptions to the exclusionary rule. In this complicated area, it is wiser to let the cases speak for themselves and to encourage careful analysis and argument than to endorse vague headings which add little to our understanding of the problems and which, because of this symbolic impact, may lead inadvertently to a weakening of the Fourth Amendment's protection.

Id. at 60. Similar conclusions were reached in United States v. Williams, 622 F.2d at 850 (Rubin, J., concurring specially); United States v. Ajlouny, 629 F.2d at 830; United States v. Dien, 609 F.2d 1038, 1046 (2d Cir. 1979).

The necessary guidance, however, can be found in court opinions and the American Law Institute's MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § SS 290.2 (Proposed Official Draft 1975). Supreme Court Justice Powell expressed approval of the A.L.I. proposal in Stone v. Powell, 428 U.S. at 490-91 n.29.

[81] United States v. Dien, 609 F.2d at 1038.

[82] In granting the defendants' motion to suppress in United States v. Santucci, 509 F. Supp. at 177, the court was harshly critical of the government's failure to go through the grand jury to obtain the defendants' fingerprints and handwriting samples. The court would not consider the government's claim of subjective good faith. "[T]he government will not be permitted to lift itself by its own bootstraps by establishing impermissible procedures and then arguing it has followed these procedures in 'good faith.' " *Id.* at 183 n.8. *Accord,* United States v. Nelson, 411 F. Supp. at 77.

knowledge of the illegality of his or her conduct cannot be deterred,[83] an examination of the underlying deterrence principles of the exclusionary rule reveals that this argument fails to recognize that the exclusionary rule serves as a *general* deterrent to illegal conduct rather than as a form of punishment of the officer in any particular case.[84] Thus, it is not inconsistent to charge an individual police officer with knowledge of the illegality of his or her actions even if that individual could not have been deterred.

Second, the context in which the illegal search occurs is an important limiting factor. Police officers are not infallible, and requiring objectively reasonable conduct will not impose an impossible standard of conduct on them in urgent field operations.[85] When, however, the illegality occurs in a relatively tension-free environment, a more stringent standard of conduct should be imposed.[86]

Third, the burden of proof is on the government to prove the objective good faith.[87] Thus, in a borderline situation, a trial court would be required to sustain the motion to suppress, thereby encouraging law enforcement personnel and the agencies that train them to acquaint themselves with, and give proper respect to, constitutional requirements.

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[83] Comment, *supra* note 79, at 628.

[84] "The exclusionary rule is aimed at affecting the wider audience of all law enforcement officials and society at large." United States v. Peltier, 422 U.S. at 556-57 (Brennan, J., dissenting). *Accord,* Oaks, *supra* note 6, at 710.

[85] The Supreme Court has placed particular emphasis on the needs of a police officer acting in the field. In Michigan v. Tucker, 417 U.S. at 446, the Court stated: "Before we penalize police error . . . we must consider whether the sanction serves a valid and useful purpose." *Id.*

A stronger criticism of the exclusionary rule's impact on field officers came in United States v. Soyka, 394 F.2d 443 (2d Cir. 1968). "To me it degrades the Fourth Amendment when as judges we condemn him [the officer] for making an arrest that, as he reasonably believed, his duty as a federal officer compelled." *Id.* at 451 (Friendly, J., dissenting).

The Supreme Court of Colorado, which has not explicitly adopted the good faith doctrine, has on two occasions recognized the practical difficulties of a police officer in determining probable cause in a pressure situation. *See* People v. Eichelberger, 620 P.2d 1067, 1071 n.2 (Colo. 1980); People v. Smith, 620 P.2d 232 (Colo. 1980).

[86] *See* United States v. Santucci, 509 F. Supp. at 179.

[87] Brown v. Illinois, 422 U.S. at 604.

CONCLUSION

The Supreme Court of the United States has expressed a willingness to reconsider the exclusionary rule in terms of the practical difficulties facing police officers and the costs of its operation upon society at large. Anticipating that the Court is searching for a new approach to fourth amendment rights in all contexts, lower courts have adopted the good faith doctrine. As the court stated in *Williams v. United States:*

> Where the reason for a rule ceases, the rule should also cease—a familiar maxim carrying special force here. For here the cost of applying the rule is one paid in coin minted from the very core of our factfinding process, the cost of holding trials at which the truth is deliberately and knowingly suppressed and witnesses, in contravention of their oaths, are forbidden to tell the whole truth and censored if they do. This is a high price indeed and one that ought never be paid where, in reason, no deterrence is called for and none can in fact be had. Such a continued wooden application of the rule beyond its proper ambit to situations that its purposes cannot serve bids fair to destroy the rule entirely in the long run.[88]

It is not claimed that this exception is an infallible touchstone which perfectly accommodates the competing interests of the individual and society at large. That is not to say, however, that good faith cannot be a useful analytical device in deciding whether to suppress improperly obtained evidence. Confidence must be placed in the courts which apply the rule.[89] Protection of fourth amendment rights is the utmost consideration in such a determination. But when the exclusion of evidence fails to meet such a laudable purpose, courts should have more than a "single-bed blanket" with which to reach a just and equitable result. The questionable effectiveness of the exclusionary rule should not be used to justify an inflexible approach to the protection of fourth amendment rights.

Holly Martin Stone

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[88] 622 F.2d at 847.

[89] Brown v. Illinois, 422 U.S. at 612. "[I]n view of the inevitably fact-specific nature of the inquiry, we must place primary reliance on the 'learning, good sense, fairness and courage' of judges who must make the determination in the first instance." *Id.* (citing Nardone v. United States, 308 U.S. 338, 342 (1939)).