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Good Faith, Reasonableness - and the Lesson of Maryland v. Garrison: Know Thy Neighbor

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GOOD FAITH, REASONABLENESS — AND THE LESSON OF *MARYLAND v. GARRISON*: KNOW THY NEIGHBOR

INTRODUCTION

"The good-faith exception to the warrant requirement was stretched so far in *Maryland v. Garrison* . . . that it may never snap back."[1] The Supreme Court, in an opinion by Justice Stevens, held that a search warrant, although it turned out to be overbroad when executed, was valid when issued.[2] Police officers executed a search warrant for the premises of Lawrence McWebb, located on the third floor of 2036 Park Avenue,[3] but mistakenly searched both McWebb's apartment, the intended target of the warrant, and that of his neighbor, Garrison.[4] The Court stated that since the police believed in good faith that McWebb's apartment was the only apartment located on the third floor, the search of Garrison's apartment, also located on the third floor, was reasonable.[5] Therefore, the evidence found in Garrison's apartment was not suppressed.[6] The *Garrison* Court essentially diluted the specificity requirement of the search warrant, and used "good faith mistake" to justify the warrantless entry and search of Garrison's apartment.

Technically, the good faith exception to the warrant requirement recognized by the *Garrison* Court cannot be sustained under *United States v. Leon*[7] or *Massachusetts v. Sheppard*,[8] two cases which represent the Court's official adoption of a "good faith" exception to the exclusionary rule.[9] The

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1. Bernstein, *Search & Seizure*, 23 TRIAL 90 (June 1987).

2. Maryland v. Garrison, 107 S. Ct. 1013, 1018 (1987). "There is no question that the warrant was valid and was supported by probable cause." *Id.* at 1015.

3. *Id.* at 1015. "The search warrant which was issued authorized the police to search for marijuana and related materials 'on the person [and] on the premises [of] Lawrence Meril McWebb, [at] 2036 Park Avenue third floor apartment described as being a three story brick dwelling with the numerals 2-0-3-6 affixed to the front of same.'" Garrison v. State, 303 Md. 385, 387, 494 A.2d 193, 194 (1985).

4. Garrison v. State, 58 Md. App. 417, 473 A.2d 514 (Md. App. 1984).

5. Garrison, 107 S. Ct. at 1019.

6. *Id.* at 1020.

7. 468 U.S. 897, *reh'g denied*, 468 U.S. 1250 (1984).

8. 468 U.S. 981 (1984).

9. For commentary on the *Leon* doctrine, see Alschuler, *"Close Enough for Government Work": The Exclusionary Rule After* Leon, 1984 SUP. CT. REV. 309; Bacigal, *An Alternative Approach to the Good Faith Controversy*, 37 MERCER L. REV. 957 (1986); Dripps, *Living with* Leon, 95 YALE L.J. 906 (1986); Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85 (1984); Comment, *Blessed are the Faithful: An Analysis of the Scope and Applicability of the Good Faith Exception to the Exclusionary Rule*, 15 U. BALT. L. REV. 496 (1986).

exception established in those cases concerns a police officer's reliance on a facially valid warrant that is later determined to be invalid due to insufficient facts establishing probable cause[10] or because the warrant is technically insufficient.[11] However, much of the language in *Garrison* indicates that this decision was based upon the principles which formed the basis for the *Leon* and *Sheppard* decisions: the purpose of the exclusionary rule is deterrence of police misconduct, and this purpose is not served when police officers in good faith believe that they are in compliance with the Constitution.[12]

Since its inception in *Weeks v. United States,*[13] the exclusionary rule, which prohibits the use of evidence seized as a result of a fourth amendment violation, has been an issue of heated debate within the Court.[14] The executive branch, through the Attorney General, has advocated limiting the exclusionary rule in order to get tough on crime.[15] The benefits and detriments of the rule have been discussed at length within the legislative halls[16] and among numerous commentators and scholars.[17] Although labeled a "judicially cre-

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10. *Leon,* 468 U.S. at 905.

11. *Sheppard,* 468 U.S. at 990-91. "This case involves the application of the rules [in *Leon*] to a situation in which police officers seize items pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge." *Id.* at 983-84.

12. Justice White limited the good faith in *Leon* to reliance on a warrant that is later held to be invalid due to lack of probable cause. *Leon,* 468 U.S. at 926. In *Sheppard,* however, he limited the good faith to reliance on a warrant later held invalid because of a technical insufficiency. *Sheppard,* 468 U.S. at 990-91. His concurrence in *Gates* suggested that evidence should not be suppressed in any case where police officers reasonably believed that their conduct was in compliance with the fourth amendment. Illinois v. Gates, 462 U.S. 213, 255, *reh'g denied,* 463 U.S. 1237 (1983) (White, J., concurring).

13. 232 U.S. 383 (1914).

14. For one of the most comprehensive attacks on the exclusionary rule, see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (describing rule as "both conceptually sterile and practically ineffective in accomplishing its stated objective"). *But see* Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 COLUM. L. REV. 1365, 1383-84 (1983) (defending rule as a constitutionally required remedy: "The proscription and guarantees in the amendments were intended to create legal rights and duties.").

15. *See, e.g.,* 1981 ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIMES, FINAL REP. 55 ("[E]vidence 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.").

16. The Exclusionary Rule Bills: Hearings Before the Subcommittee on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. 1 (1982).

17. *See generally* Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?,* 62 JUDICATURE 66, 67 & 84 (1978) (exclusionary rule is necessary to give effect to the fourth amendment, and "imperative of judicial integrity" requires that a bright line be drawn between constitutional and unconstitutional behavior (citing Elkins v. United States, 364 U.S. 206, 222 (1960))); Loewy, *The Fourth Amendment as a Device for Protecting the Innocent,* 81 MICH. L. REV. 1229, 1272 (1983) ("the Court has failed to recognize the exclusionary rule as a device for protecting the innocent," since only the guilty benefit from its direct application; "[c]onsequently the rule has been restricted so much that it fails to offer innocent citizens the protection to which they should be entitled. . ."); McGarr, *The*

ated remedy" by the Court,[18] the exclusionary rule has also been affirmed as an essential part of the fourth amendment.[19] The rule has undergone a drastic transformation in the last decade and may well become an obsolete doctrine.

This Casenote will trace the development of fourth amendment constitutional law as it pertains to areas and interests protected by the warrant requirement, and the special protection courts have historically given to the home. The development of the exclusionary rule, as well as the exceptions the Court has designed to restrict its application, will also be presented. This Casenote will then examine the facts and issues of *Garrison* and show how the Court ignored other possible grounds for allowing the conviction against Garrison, in favor of relaxing the specificity requirement of the search warrant, and allowing a warrantless entry and search of a home under the rubric of "good faith mistake."

I. BACKGROUND

The fourth amendment[20] was placed in the Bill of Rights by the Framers, largely as a result of American pre-revolutionary struggles with England,

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Exclusionary Rule: An Ill Conceived and Ineffective Remedy, 52 J. CRIM. L., CRIMINOLOGY & POL. SCI. 266, 268 (1961) (concluding that exclusionary rule is "a piece of pure judicial legislating" aimed at achieving a social goal, and that rule punishes society as a whole whenever a police officer acts unconstitutionally); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 373 (1981) (rule is necessary for systemic deterrence and opponents of exclusion "should not mask their objection to an interpretation of the fourth amendment as an attack on the exclusionary rule"); Schrock & Welsh, *Up From* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974) (rule is necessary to enforce two principles: 1) to promote and ensure respect for the security of person and property; and, 2) discouraging "executive misconduct" by exclusion); Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343, 376 (1980) (exclusion is product of due process and is "natural consequence" of judicial review, therefore, rule is an issue of "constitutional magnitude" which should not be fought with partisanship); White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273 (1983) (discusses historical property aspects of origin of *Weeks*); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 223 (1978) (argues that "the rule in its indiscriminate workings does far more harm than good and, in many respects, it actually prevents us from dealing with the real problems of Fourth Amendment violations . . . ."); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 737 (1972) (since exclusionary rule is only applicable after a search and seizure has brought out evidence of a crime, rule benefits only the guilty).

18. United States v. Calandra, 414 U.S. 338, 348 (1974) ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights."). *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949) (exclusionary rule "was not derived from the explicit requirements of the Fourth Amendment. . . . The decision was a matter of judicial implication.").

19. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court held the exclusionary rule applicable against the states. *Id.* at 655. The Court reasoned that if it were to hold otherwise, the fourth amendment's rights and assurances against unreasonable searches and seizures would be "valueless." *Id.*

20. The fourth amendment guarantees that "[t]he right of the people to be secure in their

and the use of general warrants and writs of assistance.[21] The amendment is short and ambiguous. It gives no definition of the word "unreasonable," does not clearly establish the relationship between the unreasonable searches and seizures clause and the warrant clause, and is silent as to what remedy, if any, should be used to address violations.[22] Substantive law under the fourth amendment developed slowly as it remained "unexplored territory" for almost a century,[23] until *Boyd v. United States*[24] in 1886. The Court slowly handed down decisions defining the fourth amendment, as well as developing a remedy for its violations.[25] The flurry of activity on fourth amendment law which dominated the Warren Court[26] is largely responsible for the present understanding of the amendment, which continues to be redefined.[27]

A. Protection Of The Home

Although the analysis used in determining what is protected by the fourth amendment has changed, the one constant principle has been that the protection given the home is paramount.[28] This section will focus primarily

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persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

21. *See* Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., CRIMINOLOGY & POL. SCI. 246, 249-50 (1961); Bloom, *Warrant Requirement—The Burger Court Approach*, 53 U. COLO. L. REV. 691, 694-96 (1982); Lewis, *An Instrument of the New Constitution: The Origins of the General Warrant*, 7 J. LEGAL HIST. 256 (1986). Courts have often discussed the historical motivation for the Framers in their fourth amendment adjudication. *See* Walter v. United States, 447 U.S. 649, 657 (1980) (indiscriminate searches pursuant to general warrants were primary reasons for adoption of the fourth amendment); Payton v. New York, 445 U.S. 573, 583 (1980) ("It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."); United States v. United States Dist. Court, 407 U.S. 297, 313-14 (1972) (explaining that historical struggle between England and the Colonies centered on issues of searches and seizures, as well as on freedoms of speech and the press). In United States v. United States Dist. Court, Justice Douglas stated, "it was such excesses as the use of general warrants and the writs of assistance that led to the ratification of the Fourth Amendment." *Id.* at 327 (Douglas, J., concurring).

22. 1 W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 5-7 (2d ed. 1987).

23. J. LANDYNSKI, SEARCH & SEIZURE AND THE SUPREME COURT 42 (1966).

24. 116 U.S. 616 (1886). In *Boyd*, the Court established a link between the fourth and fifth amendments by holding compulsory production of documents as a search and seizure. *Id.* at 621-23.

25. *See* Allen, *supra* note 21, at 246-50; Comment, United States v. Leon: *Fourth Amendment Rights Eroded to Pre-Constitutional Status*, 20 NEW. ENG. L. REV. 317, 327-33 (1984).

26. *Cf.* Harris, *The Return to Common Sense: A Response to "The Incredible Shrinking Fourth Amendment,"* 22 AM. CRIM. L. REV. 25 (1984) (describing fourth amendment decisions during the Warren Court as "excesses").

27. *See infra* notes 144-206 and accompanying text.

28. *See infra* note 47.

on how the warrant protects this interest, particularly through its specificity requirement.[29]

1. The Katz *expectation of privacy test*

An examination of fourth amendment law should begin with the understanding that "searches and seizures" are words of limitation.[30] Police are not required by the fourth amendment to be reasonable unless their actions are categorized as "searches or seizures."[31] The Court has defined the term "seizure" to apply to situations where there is "some meaningful interference" with a person's possessory interests.[32] As to the former term, during the pre-*Katz* era, a search was defined as a physical intrusion into a "constitutionally protected area."[33] The landmark decision of *Katz v. United States*[34] re-defined the law of search and seizure when the Court held that the fourth amendment "protects people, not places."[35]

In *Katz,* the defendant was convicted in federal court of transmitting wagering information through a public telephone.[36] The evidence used to sustain the conviction was obtained by an electronic listening and recording device attached to the outside of a telephone booth Katz used to transmit the wagering information.[37] The Court overruled *Olmstead v. United States*[38] and *Goldman v. United States*[39] and held that the fourth amendment not

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29. *See infra* note 68.

30. Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 356 (1974). *See generally* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (fourth amendment's protection limits only government action); Arkansas v. Sanders, 442 U.S. 753, 757-58 (1979) (fourth amendment protects privacy in essentially two ways: 1) it guarantees citizens that they will not be subject to unreasonable searches and seizures by the government; and, 2) searches and seizures are normally conducted pursuant to a warrant and in compliance with its requirements); Delaware v. Prouse, 440 U.S. 648, 654 (1979) (whether or not a particular intrusion is permissible depends on result of balancing "intrusion on the individual's fourth amendment interests against its promotion of legitimate governmental interests").

31. Amsterdam, *supra* note 30, at 356. *E.g.,* Delaware v. Prouse, 440 U.S. at 653-54 ("essential purpose" of the fourth amendment is to impose a standard of reasonableness upon any governmental intrusions into the privacy of citizens).

32. United States v. Jacobsen, 466 U.S. 109, 113 (1984). *See also* Delaware v. Prouse, 440 U.S. at 653 (stopping and detaining automobile, even for brief period, constitutes a "seizure"); Terry v. Ohio, 392 U.S. 1 (1968) (whenever police officer impairs another's freedom to walk away, that person has been "seized").

33. Amsterdam, *supra* note 30, at 357. *See, e.g.,* Silverman v. United States, 365 U.S. 505, 509-10 (1961) (Court held that attaching electronic listening device to heating duct constituted violation of the fourth amendment and suppressed conversations overheard by police); Goldman v. United States, 316 U.S. 129, 134-36 (1942) (use of detectaphone placed against outside wall in order to hear conversations held to be not violative of the fourth amendment).

34. Katz v. United States, 389 U.S. 347 (1967).

35. *Id.* at 351.

36. *Id.* at 348.

37. *Id.*

38. 277 U.S. 438 (1928).

39. 316 U.S. 129 (1942).

only governs the seizure of tangible items, but also protects the recording of oral statements.[40] The Court asserted that once this is recognized, it is clear that the protection of the fourth amendment cannot depend upon the presence or absence of a physical intrusion.[41] Justice Harlan concurred with the result, but reasoned that the protection of the fourth amendment is measured by reference to a place, and set forth two requirements which must be satisfied.[42] According to Justice Harlan, it should first be determined whether a person has exhibited an actual subjective expectation of privacy, and if so, whether that expectation is one which society would accept as reasonable.[43] This is the approach taken by the lower courts attempting to apply *Katz*,[44] as well as by the majority of the Court.[45]

However, even prior to *Katz*, the home enjoyed constitutional protection.[46] With the *Katz* expectation of privacy test, the special protection afforded homes arguably remains intact, since society recognizes the home as a place one can reasonably expect privacy.[47] Justice Stevens, writing for the majority in *Payton v. New York*,[48] stressed that since the home has always been regarded as an "especially private place," it deserves special protection

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40. Katz v. United States, 389 U.S. 347, 353 (1967).

41. *Id.*

42. *Id.* at 361 (Harlan, J., concurring).

43. *Id.*

44. *See, e.g.*, United States v. Jackson, 588 F.2d 1046, 1051-52 (5th Cir.) (holding that defendants had no reasonable expectation of privacy when their conversations were being overheard by unaided ears of police in adjoining room), *cert. denied*, 442 U.S. 941 (1979); United States v. Branch, 545 F.2d 177, 182 (D.C. Cir. 1976) (court, reversing conviction of defendant, held that "a transient visitor retains his expectation of privacy, and it makes little difference whether his belonging is being personally held by him or has been set down temporarily," (citing United States v. Micheli, 487 F.2d 429 (1st Cir. 1973))).

45. *See* Kitch, Katz v. United States: *The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133. *Accord* California v. Ciraolo, 476 U.S. 207, 211-15 (1986) (using *Katz's* two-part analysis, Court held that the "naked eye" observation of defendant's backyard from airplane, which revealed marijuana, did not violate fourth amendment since such an expectation of privacy would be unreasonable); United States v. Jacobsen, 466 U.S. 109, 113 (1984) (search occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed"); Oliver v. United States, 466 U.S. 170, 177 (1984) ("Since [*Katz*], the touchstone of [fourth] Amendment analysis has been the question of whether a person has a 'constitutionally protected reasonable expectation of privacy'" which is not only based on subjective expectation, but also on what is recognized as reasonable by society); Michigan v. Clifford, 464 U.S. 287 (1983) (Court held that reasonable expectation of privacy in fire damaged property may be reasonably recognized).

46. *Silverman*, 365 U.S. at 511 ("At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

47. *See generally* Griffin v. Wisconsin, 107 S. Ct. 3164, 3173 (1987) (Blackmun, J., dissenting) (home is "the place that traditionally has been regarded as the center of a person's private life, the bastion in which one has a legitimate expectation of privacy protected by the Fourth Amendment."); United States v. United States Dist. Court, 407 U.S. 297, 313 (1972) (Justice Powell, writing for the majority, stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

48. 445 U.S. 573 (1980).

against unreasonable searches and seizures.[49] This protection is generally in the form of a stern adherence to the requirement of a valid search warrant, and labeling warrantless entries as *per se unreasonable.*[50]

Evidence seized pursuant to a warrantless entry will not be suppressed if there has been a voluntary consent.[51] In addition, evidence will not be suppressed if the police have entered in "hot pursuit"[52] or under exigent circumstances to protect the loss of life or evidence.[53] The Court has promulgated these "carefully drawn" exceptions whenever the societal costs of obtaining a warrant have been held to outweigh the privacy interest of the individual.[54]

2. The warrant requirement

In *Katz,* the Court proclaimed that warrantless searches are per se unreasonable under the fourth amendment, subject only to a few "specifically established and well-delineated exceptions."[55] Although the Court has since allowed a number of exceptions to the pre-search warrant requirement,[56] the

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49. *Id.* at 589-90. The Court held that in order to arrest an individual in his own home, the police must obtain an arrest warrant, absent exigent circumstances, since "the Fourth Amendment has drawn a firm line at the entrance to the house." *Id.* at 590.

50. Bogdanos, *Search and Seizure: A Reasoned Approach,* 6 PACE L. REV. 543, 554 (1986) (discussing dramatic changes in fourth amendment law, author asserts that "there is a valid argument that the *'per se* unreasonableness of warrantless searches' sentiment which received its greatest voice in *Coolidge* [403 U.S. 443 (1971)] has been transformed ever so adroitly into the current view that only those warrantless searches that are of houses are *per se* unreasonable"). *See also* Payton v. New York, 445 U.S. at 590 ("Absent exigent circumstances, that threshold [the home] may not reasonably be crossed without a warrant."); Steagald v. United States, 451 U.S. 204, 211 (1981) ("Except in such special situations [consent or exigent circumstances], we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant."). *But cf.* Griffin v. Wisconsin, 107 S. Ct. 3164, 3171 (holding that "special needs" of probation system allowed for warrantless search of probationer's home pursuant to a regulation providing for such, and is thus reasonable under the fourth amendment).

51. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that when suspect is not in custody, the state has burden of proving consent, and this is judged from a totality of the circumstances, based on objective facts).

52. Warden v. Hayden, 387 U.S. 294 (1967) (upholding search throughout house as valid since the "exigency" of the situation was the hot pursuit of suspect, and distiction between "mere evidence" and fruits or instrumentalities was eliminated).

53. Schmerber v. California, 384 U.S. 757 (1966) (characterizing withdrawal of blood at request of police officer, which resulted in a conviction for driving while intoxicated, as exigent circumstance to save the destruction of evidence).

54. Arkansas v. Sanders, 442 U.S. 753, 759 (1979).

55. 389 U.S. at 357.

56. *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent); Coolidge v. New Hampshire, 403 U.S. 443 (1971) ("plain view" doctrine allowing for seizure of objects in plain view if officer has legal access to item, has probable cause to believe item is connected to crime, and access is inadvertent); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970) (exigent circumstances); Terry v. Ohio, 392 U.S. 1 (1968) (listing exceptions to warrant requirement); Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative searches); Schmerber v. California, 384 U.S. 294 (1966) (exigent circumstances existed where blood was removed for evidence of intoxication); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception).

Court adheres to a general preference for with-warrant searches.[57]

A search warrant is not merely a formality, but rather, serves the "high function" of placing the judgment of a magistrate between the public and law enforcement officials.[58] The warrant clause[59] sets forth three criteria that must be satisfied before a warrant is issued: (1) probable cause to be determined by a neutral and detached magistrate;[60] (2) supported by oath or affirmation;[61] and, (3) a sufficiently particular description of the items to be seized or the place to be searched.[62] Thus, the warrant requirement provides for protection through two distinct limitations. First, any searches or seizures must be supported by probable cause.[63] Second, even if probable cause exists, the specificity requirement will limit the search to prevent a "general exploratory rummaging" through an individual's property.[64]

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57. Arkansas v. Sanders, 442 U.S. 753, 758 (1979) ("In the ordinary case, therefore, a search of private property must be both reasonable and pursuant to a properly issued search warrant; the mere reasonableness of a search . . . is not a substitute for the judicial warrant required under the Fourth Amendment."); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (rejecting "murder scene exception" created by Arizona, Court stressed that the fourth amendment "proscribes all unreasonable searches and seizures, and it is a cardinal principle" that searches are per se unreasonable absent a warrant or well-delineated exceptions); Agnello v. United States, 269 U.S. 20, 33 (1925) ("Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant."). *But see* Bloom, *The Supreme Court and Its Purported Preference for Search Warrants,* 50 TENN. L. REV. 231 (1983) (criticizes Court for not following original justifications when creating exceptions to warrant requirement).

In United States v. Karo, 468 U.S. 705, 712 (1984), the Court held that transferring an unmonitored beeper hidden in a can of ether from a DEA agent to defendant does not constitute a search or seizure, however, the Court stated that "warrants for the installation and monitoring of a beeper will obviously be desirable . . . ." *Id.* at 713 n.3.

58. McDonald v. United States, 335 U.S. 451, 455 (1948). *See also* United States v. United States Dist. Court, 407 U.S. 297, 332 (1972) (Douglas, J., concurring) ("The Warrant Clause has stood as a barrier against intrusions by officialdom into the privacies of life.").

59. U.S. CONST. amend. IV. "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 particulary describing the place to be searched, and the person or things to be searched."

60. Shadwick v. City of Tampa, 407 U.S. 345 (1972) (magistrate must be neutral and detached and capable of determining "whether probable cause exists for the requested arrest or search"); *Coolidge,* 403 U.S. at 450-53 (holding invalid warrant issued by the state's attorney general, since such executive officer is not neutral and detached).

61. *See, e.g.,* Frazier v. Roberts, 441 F.2d 1224, 1228 (1971) (court found warrant was issued in violation of fourth amendment since police officer's testimony not given under "oath or affirmation"). *See generally* 1 W.R. LAFAVE, J.H. ISRAEL, CRIMINAL PROCEDURE 3.4(c) (1984).

62. *See infra* notes 65-87 and accompanying text.

63. United States v. Heldt, 668 F.2d 1238, 1256 (D.C. Cir. 1981); United States v. $10,000 In U.S. Currency, 780 F.2d 218 (2d Cir. 1986) ("A search warrant must be obtained for incriminating evidence which the government believes will be found and for which it has probable cause."). *See generally* Payton v. New York, 445 U.S. 573, 586 (1980) ("the warrant procedure minimizes the danger of needless intrusions" upon citizens' privacy interests).

64. *Heldt,* 668 F.2d at 1256.

3. *Particularity of description*

The fourth amendment expressly requires that no warrants shall issue except those "particularly describing the place to be searched."[65] This requirement has a two-fold purpose. First, it compels the executing officer to pinpoint the place to be searched, or the items to be seized, thus limiting the scope of the search.[66] Second, it bolsters the necessary showing of probable cause[67] by demonstrating that there is reason to believe that the items are to be found in the specified place.[68]

Generally, as the Court stated in *Steele v. United States,*[69] the description is sufficient if the executing officer can reasonably identify the place to be searched.[70] The description should preclude the mistaken search of another residence.[71] No formal requirements as to the specificity of the location are

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65. U.S. CONST. amend. IV. For an interesting analysis of the warrant clause, see Bloom, *supra* note 21; Note, *Criminal Law In the Ninth Circuit: Recent Developments*, 15 LOY. L.A.L. REV. 431, 438 (1982).

66. Walter v. United States, 447 U.S. 649, 656 (1980) ("When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization.").

67. The cases of Aguilar v. Texas, 393 U.S. 410 (1969) and Spinelli v. United States, 378 U.S. 108 (1964) provided a working formula for establishing probable cause in an affidavit for a warrant. The two-pronged test required that the affidavit: (1) set forth the facts to support the validity of the conclusion that the materials sought are located where the source claims, and; (2) set forth information establishing the veracity and reliability of the source. This test was rejected as too technical and limiting, and was subsequently replaced by a "totality of the circumstances test" in Illinois v. Gates, 462 U.S. 213 (1983). The two prongs thus became items to be considered in the overall set of circumstances. *See generally* United States v. Strauss, 678 F.2d 886, 892 (11th Cir. 1982) ("Probable cause exists if facts within the magistrate's knowledge and of which he had reasonably trustworthy information would warrant a man of reasonable caution in the belief that a crime was committed and that evidence is at the place to be searched."); United States v. Freeman, 532 F.2d 1098, 1100 (7th Cir. 1976) (probable cause is based on "the probability, and not a *prima facie* showing of criminal activity" with due deference given to issuing magistrate).

68. *See* United States v. Betancourt, 734 F.2d 750, 754 (11th Cir.) (search warrant can only be issued if there is probable cause to believe that offense has been committed and that evidence of such exists at place to be searched), *cert. denied,* 469 U.S. 1076 (1984); United States v. McKinney, 758 F.2d 1036, 1043 (5th Cir. 1985) (nexus between items sought to be seized and place to be searched may be established by direct observation or inferences as to where items may be located); United States v. Young, 745 F.2d 733, 759 (2d Cir. 1984) (particularity requirement serves three purposes, which are "preventing general searches, preventing the seizure of objects upon the mistaken assumption that they fall within the magistrate's authorization, and preventing the issuance of warrants without a substantial factual basis").

69. 267 U.S. 498 (1925).

70. *Id.* at 503.

71. *See Betancourt,* 734 F.2d at 754-65 ("Elaborate specificity is unnecessary" as long as executing officer can reasonably ascertain premises to be searched); United States v. Gitcho, 601 F.2d 369, 371 (8th Cir. 1979) ("[W]hether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort and whether there is any reasonable probability that another premise might be mistakenly searched."); United States v. Johnson, 541 F.2d 1311, 1313-14 (8th Cir.

necessary, since this is judged on a case-by-case basis.[72] Even if the description contained in the warrant is not sufficient, courts have allowed this deficiency to be "cured" in one of two ways: if documents attached to the warrant provide additional information and aid in the description,[73] or if the executing officer has been to the location previously and can supplement the deficiency in the warrant by personal knowledge.[74]

It has been argued that the specificity requirement should be even more stringent when the premises to be searched involve an apartment in a multi-unit structure.[75] As Justice Blackmun pointed out in his *Garrison* dissent, "such forms of habitation are now common in this country, particularly in neighborhoods with changing populations and of declining affluence."[76] The general rule is that a search warrant directed at a unit in a multi-unit structure will be held invalid if the warrant fails to describe the targeted unit with sufficient definiteness to preclude the search of other units within the structure.[77] However, there are certain exceptions to this general rule. For example, even if the warrant would normally be deficient as to the description requirement, the search will still be upheld if enough information guides the

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1976) (standard is "practical accuracy rather than technical nicety" which requires that nothing be left to discretion of police officer executing warrant). *See generally* United States v. Burke, 784 F.2d 1090, 1092 (11th Cir. 1986) ("A warrant's description of the place to be searched is not required to meet technical requirements or have the specificity sought by conveyancers.").

72. *See, e.g.*, Luster v. State, 433 So.2d 481, 484 (Ala. Crim. App. 1983) (warrant sufficient when only name of occupant and detailed description of how to get to premises was disclosed); People v. Kissinger, 26 Ill. App. 3d 260, 263, 325 N.E.2d 28, 30-31 (1975) (although warrant did not contain name of the city, street number, street name and county were given and thus, in light of fact that county only had one street by the given name, warrant was sufficient); Pool v. State, 483 So.2d 331 (Miss. 1986) (physical description of house trailer and directions on how to get there were sufficient).

73. *E.g.*, United States v. Cantu, 774 F.2d 1305, 1308 (5th Cir. 1985) (although warrant authorized seizure of evidence of tax fraud, required specificity was supplied by attached affidavit which listed items to be seized with great detail), *cert. denied*, 479 U.S. 847 (1986).

74. *See, e.g.*, United States v. Burke, 784 F.2d 1090, 1093 (11th Cir. 1986) (although wrong street number and name were listed, executing police officer had visited premises previously with informant); United States v. Turner, 770 F.2d 1508, 1511 (9th Cir. 1985) (although wrong street address was listed, there was no possibility of mistaken search since targeted premises had been under surveillance for over one year), *cert. denied*, 475 U.S. 1026 (1986); United States v. Gitcho, 601 F.2d 369, 372 (8th Cir.) (mistaken search was precluded since erroneous address was nonexistent and targeted premises had been under surveillance), *cert. denied*, 444 U.S. 871 (1979); Anderson v. State, 249 Ga. 132, 287 S.E.2d 195 (1982) (executing officer had previously investigated premises and talked to defendant).

75. *Garrison*, 107 S. Ct. at 1023 n.4. (Blackmun, J., dissenting) ("Officers drawing a search warrant for a unit of a multiple-occupancy building should be put to a more demanding standard of reasonableness to justify any mistake than is required for those who rely on a reasonable failure to recognize at all the multi-unit nature of a structure.").

76. *Id. See also* Hearing before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess., 1 (1978).

77. *See generally* Annotation, *Search Warrant: Sufficiency of Description of Apartment or Room to Be Searched in Multiple-Occupancy Structure*, 11 A.L.R. 3rd 1330, 1333 (1967).

police to the proper unit, and only the proper unit is searched.[78] The search will also be upheld when the defendant is in control of the entire premises or living with other persons in common.[79] Searches will also be upheld in cases where it appears that the entire structure is being used for illegal activity.[80] Finally, the most significant exception is where the multi-unit nature or character of the structure is not externally apparent and the police officers did not know, or have reason to know, that more units were inside.[81]

This last exception was fully developed in *United States v. Santore.*[82] The building in this case appeared to be a single-family house, and no facts to the contrary were available to the police.[83] In reality, the occupant had subdivided the house in contravention of local ordinances.[84] The court nonetheless upheld the warrant on the grounds that there was no possible way for the police to know of the alteration since the occupant concealed it. The court also noted that once the warrant was executed it would have been too late to obtain another warrant based on the new information.[85] Thus, it appears that this exception is based on what is objectively available in terms of information about the character of the building, and whether the affiant's conclusion was reasonable. This exception was further qualified in *United States v. Davis,*[86] where the court held that once the police discover

78. *See generally* United States v. Clement, 747 F.2d 460 (8th Cir. 1984). In *Clement,* the warrant erroneously listed apartment number four, where respondent used to live, but police arrived and searched only number three, the adjacent apartment respondent had actually moved into. The court listed three factors which should be considered when the warrant is inaccurate: 1) whether the targeted premises are clearly described even if the address is incorrect; 2) whether the intended premises are adjacent to those described and both are under the control of respondent; 3) whether other correct parts of the warrant limit the search only to the targeted apartment. *Id.* at 461. *See also* Annotation, *supra* note 77, at 1340.

In United States v. Strauss, 678 F.2d 886 (11th Cir. 1982), the court held that the warrant must be precise enough to preclude a general search, and "the test is reasonableness of the description." *Id.* at 892. In this case, the court found that such a standard was met. *Id.*

79. United States v. Whitney, 633 F.2d 902 (9th Cir. 1980). In *Whitney,* although the premises were described as a single family dwelling, in actuality the house had been divided into two premises. The court upheld the search since the police were unaware of any separation, there was only one house number and one mailbox, and finally, respondent had control of the whole premises. *Id.* at 908. *See also* United States v. Page, 580 F.2d 916, 920 (7th Cir. 1978) (warrant authorized the search of entire third floor, which contained two apartments, but the target of warrant was in control of entire third floor). *See generally* Annotation, *supra* note 77, at 1341-43.

80. United States v. Alexander, 761 F.2d 1294, 1301 (9th Cir. 1985) (although warrant authorized search of an entire ranch, there was probable cause to search all buildings on ranch). *See generally* Annotation, *supra* note 77, at 1343-44.

81. *See, e.g.,* United States v. Gilman, 684 F.2d 616, 618 (9th Cir. 1982) (Court listed four recognized exceptions to the specificity requirement, found that all existed, and upheld search). *See generally* Annotation, *supra* note 77, at 1344-45.

82. 290 F.2d 51 (2d Cir. 1960).

83. *Id.* at 67.

84. *Id.*

85. *Id.*

86. 557 F.2d 1239 (8th Cir. 1977).

their error, they may only search the premises of the intended target of the warrant.[87]

The specificity requirement in the warrant process is the cornerstone of the fourth amendment's protection against arbitrary searches of the home.[88] Indeed, this was the chief evil the Framers sought to avoid by including the amendment in the Bill of Rights.[89] Thus, it is a fair assumption that the protection afforded the home is paramount in fourth amendment law.[90]

The remedy afforded victims of fourth amendment violations, that of excluding the ill-gotten evidence at trial, has been severely limited. Since the fourth amendment is curiously silent as to the procedures for its own enforcement, the Court had to develop and apply its own remedy for dealing with fourth amendment violations.[91] The attacks on this remedy of exclusion, and its subsequent restrictions, have led the Court to carve out exceptions to the exclusionary rule in the absence of viable alternatives.[92] These restrictions on the applicability of the exclusionary rule have resulted in a reshaping of traditional constitutional principles. For example, *Garrison* seems to indicate that the principle which holds all warrantless entries into a home, absent exigent circumstances, as per se unreasonable, may no longer control.[93]

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87. *Id.* at 1248 ("The only items seized during the search came from areas under Davis' use and control.").

88. *See supra* note 68.

89. *See supra* note 21.

90. *See generally* United States v. Karo, 468 U.S. 705, 714-15 (1984) ("Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances."); Payton v. New York, 445 U.S. 573 (1980) (holding that at least an arrest warrant is necessary to effect arrest in suspect's home absent exigent circumstances, Court affirmed that home deserves special protection); *Coolidge,* 403 U.S. 443 (1971) (absent exigent circumstances, it is impermissible for police to enter a home to effect an arrest without a warrant).

91. The establishment of the exclusionary rule remedy for fourth amendment violations came in Weeks v. United States, 232 U.S. 383 (1914).

92. In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the Court introduced the "Independent Source" doctrine, which allows the introduction of evidence obtained by means other than the government's own constitutional violation. *Id.* at 392. In Nardone v. United States, 308 U.S. 338 (1939), the Court, in an opinion by Justice Frankfurter, held that evidence obtained by tapping wires in violation of the Communications Act of 1934 was inadmissible, but asserted that the link between the government's violation and subsequent evidence produced may become "so attenuated as to dissipate the taint." *Id.* at 341.

The two latest exceptions to the exclusionary rule were adopted by the Court in 1984. In Nix v. Williams, 467 U.S. 431 (1984), the Court announced its adoption of the "Inevitable Discovery" doctrine which allows the introduction of evidence if the government can "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . ." *Id.* at 444. Finally, the Court adopted the "good faith exception" to the exclusionary rule in the companion cases of *Leon,* 468 U.S. 897 (1984), and *Sheppard,* 468 U.S. 981 (1984), which allow the introduction of evidence if obtained pursuant to a facially sufficient warrant which is later held invalid due to lack of probable cause (*Leon*), or a technical insufficiency (*Sheppard*).

93. *See supra* note 50.

B. The Controversy Over The Exclusionary Rule

The *Weeks* doctrine, commonly known as the exclusionary rule, established that illegally seized evidence could not be used against an accused.[94] Otherwise, the fourth amendment guarantees would have no meaning and "might as well be stricken from the Constitution."[95] However, the remedy of exclusion was applied only where the federal government and its agencies were involved in the seizure.[96] The exclusionary rule became subject to circumvention under the "Silver Platter Doctrine."[97] This doctrine allowed federal officials to enlist state law enforcement personnel, not yet subject to the exclusionary rule, to gather evidence. This evidence was subsequently used by the federal officials. Eventually, the "Silver Platter Doctrine" was abolished in *Elkins v. United States,*[98] thus extending the reach of the exclusionary rule. The exclusionary rule was again extended in *Silverthorne Lumber Co. v. United States.*[99] There, the Court held that copying illegally seized documents and using such as the basis for a subpoena was prohibited.[100] Thus, *Silverthorne* was the basis for the "fruit of the poisonous tree" doctrine.[101]

Because the fourth amendment was not yet applicable to the states, they were left free to establish their own forms of enforcing the amendment. By the time the Court held the fourth amendment applicable to the states in *Wolf v. Colorado,*[102] only 16 states had adopted the exclusionary rule through their own judicial decision or legislative action.[103] Although the *Wolf* Court held that the fourth amendment was "implicit in the concept of ordered

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94. 232 U.S. 383 (1914).

95. *Id.* at 393. The defendant was arrested at his place of employment, and charged with violation of section 213 of the Criminal Code for using the mails in furtherance of his lottery activity. *Id.* at 386. A search producing evidence was conducted at defendant's home without a warrant. *Id.*

96. *Id.* at 398.

97. The Silver Platter doctrine circumvented the exclusionary rule by allowing state officials, not yet restrained by the rule, to turn over their illegally seized evidence to federal officials. The Court first limited the application of this doctrine in the case of Byars v. United States, 273 U.S. 28 (1927), which prohibited the introduction of evidence seized by state officials with the aid of federal officers. Later that same year the Court further limited the doctrine in the case of Gambino v. United States, 275 U.S. 310 (1927), which prohibited the admission of evidence seized by state officials for a federal purpose. The Silver Platter doctrine was eventually abolished altogether in Elkins v. United States, 364 U.S. 206 (1960).

98. 364 U.S. 206 (1960).

99. 251 U.S. 385 (1920).

100. *Id.* at 392.

101. Although *Silverthorne* served as a basis for the doctrine, the actual phrase "fruit of the poisonous tree" was coined in Nardone v. United States, 308 U.S. 338, 341 (1939). *See also* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (stating that question is one of whether evidence is obtained from exploitation of the illegality, or whether by means "sufficiently distinguishable" to be purged of the taint from primary illegality).

102. 338 U.S. 25 (1949).

103. *Id.* at 29.

liberty" and thus applicable to the states through the fourteenth amendment,[104] the mode of enforcement chosen by the federal courts was held inapplicable to the states.[105] The Court instead opted to let the states develop their own remedial measures for dealing with fourth amendment violations which would be best suited to the needs of the individual states.[106] One of the most significant consequences of the *Wolf* case, however, is that it planted the "seed" of the argument that the exclusionary rule is a "judicially created remedy" and not "part and parcel" of the fourth amendment.[107]

Wolf was subsequently overruled in part by *Mapp v. Ohio,*[108] which recognized that remedies other than the exclusionary rule which were designed to provide redress to an individual for the violation of his fourth amendment rights did not adequately do so.[109] The Court pointed out that over half of the states had adopted the *Weeks* doctrine in whole or in part,[110] and held that the "rights and assurances" against unreasonable searches and seizures would be "valueless" without the adoption of the exclusionary rule.[111] *Mapp* seemed to put to rest the notion that the exclusionary rule was simply a preferred method of enforcing the fourth amendment which could be replaced by other adequate remedies.[112] Since *Mapp,* the use of the exclusionary rule to suppress illegally seized evidence both in federal and state criminal trials has been a debated issue.[113] Generally, the arguments set forth by the critics as well as the supporters of the rule center around the purpose of exclusion,[114]

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104. *Id.* at 27-28.

105. The Court, in an opinion by Justice Frankfurter, held that although the fourth amendment was applicable to the states, the manner of its enforcement was a different issue altogether, subject to different remedial measures. *Id.* at 28.

106. *Id.* at 31.

107. *Id.* at 28. *See also Leon,* 468 U.S. at 931 (Brennan, J., dissenting) ("The germ of [the] idea" that exclusionary rule is merely a "judicially created remedy" as held in *Calandra,* originated in *Wolf*).

108. 367 U.S. 652, 653 (1961).

109. *Id.* at 652. Dollree Mapp had been convicted of possessing certain obscene books, pictures and photos in violation of section 2905.34 of the Ohio Code. Police broke into her home without a warrant, pursuant to a tip about an unrelated bombing incident, and conducted an extensive search which produced the obscene materials. *Id.* at 643-44.

110. *Id.* at 651.

111. *Id.* at 655.

112. *Leon,* 468 U.S. at 940 (Brennan, J., dissenting). Justice Brennan argued that the concept of the exclusionary rule as simply a "judicially created remedy" had "been forever put to rest" with the *Mapp* decision. *Id. See also* Wilson, *The Origin and Development of the Federal Rule of Exclusion,* 18 WAKE FOREST L. REV. 1073, 1104 (1982) ("The *Mapp* Court reaffirmed the constitutional, as opposed to the discretionary, origin of the exclusionary rule, establishing the right to the exclusion as [an essential part of the fourth amendment's protection].").

113. *See supra* note 17.

114. *See generally* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?,* 16 CREIGHTON L. REV. 565 (1983) (defends existence of rule by judicial implication as opposed to remedy based on empirical evidence); Stewart, *supra* note 14, at 1372 ("[N]o decision by the Court has ever fully explored the possible alternative doctrinal bases for the rule, and the justifications for the rule seem to have changed subtly over time—usually without any explicit recognition by the Justices involved.").

and the use of a cost/benefit balancing test.[115] Indeed, an examination of both of these concepts is necessary to understand the approach the Court has recently adopted to limit the rule and create its exceptions.[116] Thus, this Casenote will turn to a brief analysis of the purposes and criticisms of the rule.

1. The purposes of exclusion

The major purpose of the exclusionary rule is to deter the police from effecting unreasonable searches and seizures.[117] Proponents of the rule reason that if the evidence produced by the unconstitutional behavior is suppressed at trial, the government will be more careful to comply with fourth amendment mandates in the future.[118] Although recent Supreme Court cases suggest that the sole purpose of the exclusionary rule is "specific deterrence,"[119] the supporters of the rule maintain that the proper focus should be on "systemic deterrence."[120]

A second purpose of the rule is "to preserve judicial integrity" since to sanction violations of the fourth amendment would be to "affirm by judicial decision a manifest neglect if not an open defiance of the Constitution."[121]

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115. Note, *Constitutional Criminal Procedure—The Good Faith Exception in Action*—Massachusetts v. Sheppard, 59 TUL. L. REV. 1100, 1103 (1985) (since *Calandra,* exclusionary rule has been redefined and has become a "prophylactic device rather than a right, a mere deterrent of police misconduct, not a means of rectifying the errors of judges and magistrates and of preserving the judiciary from participation in constitutional infractions" whose application depends on results of a cost/benefit balancing test).

116. *See supra* note 92.

117. *Accord* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984) ("[T]he 'prime purpose' of the [exclusionary] rule, if not the sole one, is to deter future unlawful police misconduct." (quoting United States v. Janis, 428 U.S. 433, 446 (1976) and United States v. Calandra, 414 U.S. 338, 347 (1974))); Stone v. Powell, 428 U.S. 465 (1976) (holding that state prisoner who has fully litigated a fourth amendment claim in a fair trial may not obtain federal habeas relief on ground that unlawfully obtained evidence had been introduced at trial, Court stressed that primary purpose of exclusionary rule is deterrence); United States v. Calandra, 414 U.S. 338, 347-48 (1974) (holding that exclusionary rule is a "judicially created remedy," and its prime purpose is to deter future unlawful police conduct).

118. *See* Linkletter v. Walker, 381 U.S. 618, 636-37 (1965); Elkins v. United States, 364 U.S. 206, 221-22 (1960).

119. Specific deterrence can be defined as that which focuses on the misconduct of individual police officers. Justice White's argument in *Leon,* that the exclusionary rule cannot "cure" the invasion which has already taken place, suggests that the current Court focuses on this type of deterrence. *Leon,* 468 U.S. at 906.

120. Systemic deterrence is defined as that which focuses on the entire system of law enforcement. Retired Justice Stewart argues that although there is generally little evidence of specific deterrence, there is a marked increase in the number of warrants issued after *Mapp,* and there is a sharp increase in training of police officers on the fourth amendment. Stewart, *supra* note 14.

121. *Weeks,* 232 U.S. at 394; *See also Calandra,* 414 U.S. at 357 (Brennan, J., dissenting) (one of purposes of exclusionary rule is to prevent judiciary from becoming partners with police in "official lawlessness"). For an interesting pre-*Mapp* analysis supporting the exclusionary rule, see Paulsen, *The Exclusionary Rule and Misconduct By The Police,* 52 J. CRIM. L., CRIMINOLOGY & POL. SCI. 255 (1961).

The "imperative of judicial integrity" argument has recently fallen out of favor with the majority of the Court.[122] However, if the purpose of the exclusionary rule was broadly defined as deterring official government misconduct as a whole, the "imperative of judicial integrity" would remain an important factor in defining the scope of the rule.[123]

A third purpose of the exclusionary rule focuses primarily on the public. The rule minimizes the risk of undermining popular trust in the government by assuring the public that the government will not profit from its lawless behavior.[124] One commentator has posited a fourth purpose of the rule, namely to restore victims of illegal searches and seizures to the position that they would have been in had the illegality not occurred.[125] This purpose is based on the theory that the fourth amendment guarantees citizens a personal right to be free from unreasonable searches and seizures.[126] What is important to recognize at this point is that the Court's perception of these purposes has defined the scope of the exclusionary rule, and may well determine its fate.[127]

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122. Justice White rejected the argument of "judicial integrity" as a secondary consideration which does not come into play absent "unusual circumstances." *Leon*, 468 U.S. at 922 n.22. *See generally* United States v. Peltier, 422 U.S. 531, 537-38 (1975) ("[T]he 'imperative of judicial integrity' is . . . not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent" have held that conduct to be unconstitutional); Sunderland, *supra* note 17, at 343 (arguing that "the concept of judicial integrity has lost its independent potency"); Stewart, *supra* note 14, at 1382, 1383 & 1400 ("Describing the judiciary as a party to the constitutional violation begs the question: what provision of the Constitution forbids the judiciary to admit illegally obtained evidence"?).

123. *See, e.g.*, Harris v. New York, 401 U.S. 222, 231-32 (1971) (Brennan, J., dissenting) (Brennan argues that "the objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system . . . it is monstrous that courts should aid or abet the law-breaking police officer"); Henderson, *Justice in the Eighties: The Exclusionary Rule and the Principle of Judicial Integrity*, 65 JUDICATURE 354, 355 (1982) ("In reducing the rule to pragmatic dimensions, critics ignore the original basis for the rule: the principle of judicial integrity which demands that the courts be isolated from contagious contact with unconstitutional activity.").

124. *See, e.g., Calandra*, 414 U.S. at 357 (Brennan, J., dissenting) (one of the purposes of exclusionary rule is to assure people—"all potential victims" of police misconduct—"that the government would not profit from its lawless behavior"). *See generally* Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 580 (1982) (exclusionary rule should be kept even if its value as a deterrent is minimal because it serves as "symbolic reassurance" that courts will not condone lawless behavior of police); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., CRIMINOLOGY & POL. SCI. 255 (1961) (unremedied fourth amendment violations tend to breed contempt for law).

125. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Devise*, 51 GEO. W. L. REV. 633, 636 (1983).

126. *Id.* at 636-37.

127. *See, e.g.*, Note, United States v. Leon *and* Massachusetts v. Sheppard*: Good Faith, The Fourth Amendment, and the Exclusionary Rule*, 30 ST. LOUIS U.L.J. 227, 242 ("The Court's decision to adopt the government's proposed good faith exception was premised on three considerations regarding the exclusionary rule: its origins, its purposes, and the effects of its application."). *See supra* note 113.

2. *Criticism of the exclusionary rule*

"We do not release a criminal from jail because we like to do so, or because we think it is wise to do so, but only because the government has offended constitutional principle in the conduct of his case."[128] Justice Harlan attempted to justify the most obvious, immediate, and detrimental result of the exclusionary rule's application.[129] The application of the rule results in suppression of evidence, which may lead to the freeing of persons clearly guilty of criminal behavior.[130] Given the lack of empirical evidence on the exclusionary rule's deterrent effect, critics argue that losing criminal convictions is a particularly high price to pay to maintain a rule of questionable effectiveness.[131] Another major criticism of the rule is that the remedy is often disproportionate to the violation which actually took place.[132] Critics also argue that exclusion was not historically required,[133] and that other criminal procedure systems function well without adopting a remedy such as the exclusionary rule.[134] Finally, critics point to the lack of support for exclusion in the text of the fourth amendment itself.[135]

As retired Justice Stewart argues, however, the criticism of the exclusionary rule is misdirected and should be focused on the fourth amendment itself.[136] Although the rule disallows the evidence in court, its critics fail to acknowledge that the illegally seized evidence would not have been obtained in the first place had the police complied with the fourth amendment.[137]

While it is true that the deterrent effect of the rule is very difficult to measure due to the absence of empirical data, one of the leading scholars

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128. Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

129. *Id.*

130. *See* McGarr, *supra* note 17, at 266; Stone v. Powell, 428 U.S. 465, 489-91 (1976).

131. United States v. Janis, 428 U.S. 433, 446 (1976) (exclusionary rule "has been unaided, unhappily, by any empirical evidence on the effects of the rule"). For one of the most comprehensive studies on the effects of the exclusionary rule, see Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970). *But see* Kamisar, *A Defense of the Exclusionary Rule,* 15 CRIM. L. BULL. 5, 35 (1979) (recent studies "have cast grave doubt on [Oaks'] conclusions and inferences about the rule's inefficacy in affecting police behavior.").

132. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 418 (Burger, J., dissenting). "Although unfortunately ineffective, the exclusionary rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms." *Id.*

133. *But see* Teague, *Applications of the Exclusionary Rule,* 23 S. TEX. L.J. 633, 635-38 (1982) (tracing history of exclusion prior to *Mapp*).

134. *Wolf,* 338 U.S. at 29 (most countries protecting a similar right do not use rule of exclusion). Allen, *The Exclusionary Rule in the American Law of Search and Seizure,* 52 J. CRIM. L., CRIMINOLOGY & POL. SCI. 246, 251 (1961).

135. *See* Stewart, *supra* note 14, at 1381. Wilkey, *Constitutional Alternatives to the Exclusionary Rule,* 23 S. TEX. L.J. 530, 542-43 (1982).

136. *See* Stewart, *supra* note 14, at 1392.

137. Kamisar, *supra* note 130, at 14. "If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it has violated the Constitution"?

on criminal procedure has noted that there is good indication that the exclusionary rule has had a positive effect on the criminal justice system.[138] There is an increase in the use of search warrants, and while there had previously been little or no training of proper police procedure as to the dictates of the fourth amendment, most municipalities now give their police force extensive training.[139] Also, relationships between prosecutors and police have been created and developed to ensure that evidence is obtained by legitimate methods.[140] Finally, the claim by police officers that they are "handcuffed" in their efforts to catch criminals is strong indication that the exclusionary rule has had an impact on law enforcement officials and procedures.

When critics focus on the "high cost" of exclusion, not only do they overlook strong evidence that such costs are over-stated,[141] but their focus is also misdirected. The purpose of the rule is not to compensate the victim,[142] but rather to give effect to the guarantees of the fourth amendment.[143] Although there is no textual support for the exclusion remedy in the amendment itself, most of the provisions in the Constitution have been subject to interpretation and remedies for these constitutional violations have been traditionally supplied by the Court.[144]

C. *The Court Chooses Sides*

In *United States v. Calandra,*[145] the Court defined the purpose of the exclusionary rule solely in terms of the deterrence of police misconduct.[146] The Court stressed that the rule is not a personal right, but rather, a "judicially created remedy" which protects fourth amendment rights by deterring police misconduct.[147] Applying a test which balanced the costs of extending the exclusionary rule to suppress illegally seized evidence in the

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138. W.R LAFAVE, *supra* note 22, at 27.

139. *Id.*

140. *Id.*

141. Fyfe, *The N.I.J. Study of the Exclusionary Rule,* 19 CRIM. L. BULL. 253 (1983). According to this study, five percent of the felony cases going through the California state system are rejected due to exclusionary rule considerations, and of those five percent, 70 percent are drug-related cases. The study "suggests that the rule affects very few of the felony cases that enter the California system, and that most of those it does effect involve drug offenses rather than crimes against persons or property." *Id.* at 260. *See also* Canon, *supra* note 123, at 560 ("A growing body of data, however, indicates that few persons arrested are able to use the rule to escape conviction. Moreover, despite rhetoric to the contrary, only a relatively small number of persons charged with violent crimes avoid conviction because of the rule.").

142. *Calandra,* 414 U.S. at 348 (exclusionary rule safeguards fourth amendment rights "generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved").

143. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

144. *See* Kamisar, *supra* note 130, at 16.

145. 414 U.S. 338 (1974).

146. *Id.* at 347.

147. *Id.* at 348.

context of a grand jury proceeding against the benefits of such an application,[148] the Court concluded that because the grand jury is not ultimately responsible for determining guilt, and because exclusion would impede the fact-finding process of the grand jury,[149] the "incremental deterrent effect" could not outweigh the costs of exclusion.[150]

This approach, which relies on a narrow definition of the exclusionary rule's purpose and establishes a balancing test to determine the necessity of exclusion, is the basis for further limitations of the rule since *Calandra.* Thus, the Court has held that a defendant who has fully litigated a fourth amendment claim at a fair trial may not obtain federal habeas corpus relief on the ground that unlawfully seized evidence had been introduced at trial,[151] because the benefit of exclusion would be incremental at best.[152] The Court has also refused to extend the rule to encompass federal civil proceedings which use evidence illegally seized by state officials,[153] or to civil deportation proceedings.[154]

At the same time the Court passed up opportunities to expand the reach of the exclusionary rule, it also carved out numerous exceptions to the rule.[155] Just as the link between the initial violation and the evidence may become "so attenuated as to dissipate the taint,"[156] the Court reasoned that evidence should not be suppressed if it was the product of an "independent source."[157]

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148. *Id.* at 354.

149. *Id.*

150. *Id. See* Schrock & Welsh, *supra* note 17.

151. *Stone,* 428 U.S. at 494.

152. *Id.* at 495. According to the Court, there is no reason to "assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced" if the rule were extended to habeas corpus proceedings. *Id.* at 493.

153. United States v. Janis, 428 U.S. 433, 447 (1976) (if exclusionary rule were applied to IRS proceedings, benefits would be "minimal" and costs high: the enforcement of laws would be hampered and relevant and reliable evidence would be excluded).

154. I.N.S. v. Lopez-Mendoza, 468 U.S. at 1046-50. The I.N.S. has its own "sensible and reasonable" steps to ensure adherence of the fourth amendment, thus deterrence would be minimal. However, the Court continued, the costs of applying the exclusionary rule to these proceedings would hamper the system, and would require the courts to "close its eyes" to continuing violations by illegal aliens. *Id.*

155. For a survey of the exceptions to the exclusionary rule that the Supreme Court has developed since *Weeks,* see Bogdanos, *Search and Seizure: A Reasoned Approach,* 6 PACE L. REV. 543 (1986). *See also supra* note 92.

156. *See* Nardone v. United States, 308 U.S. 338, 341. *Accord* Wong Sun v. United States, 371 U.S. 471 (1963) ("On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned volutarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" (quoting *Nardone,* 308 U.S. at 341)).

157. *See* Segura v. United States, 468 U.S. 796, 813 (1984) (information necessary to secure warrant for search of petitioners' home was "possessed by the agents" before illegal entry; this is an independent source since information gained after illegality was of no consequence to obtaining warrant).

The Court recognized the need to allow for reasonable mistakes of fact by law enforcement personnel,[158] and also adopted an Inevitable Discovery doctrine in *Nix v. Williams.*[159] This doctrine allows for the use of illegally seized evidence where the prosecution can establish that the evidence would have inevitably been discovered by lawful means. The stage was set for the Court to evaluate a "good faith" exception to the exclusionary rule.[160]

D. The "Good Faith" Exception

At first blush, the arguments for a good faith exception to the exclusionary rule suggest that such an exception is fair and reasonable.[161] Years before the adoption of the "good faith" exception, the Court stated in dicta that the deterrent argument for exclusion loses much of its effect when the violation was made by a police officer, who, in good faith, believed he was complying with the fourth amendment.[162] In *Illinois v. Gates,*[163] the Court

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158. Hill v. California, 401 U.S. 797, 802 (1971).

159. 467 U.S. 431 (1984). The Court held that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received." *Id.* at 444. *See also* Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules,* 74 COLUM. L. REV. 88, 100 (1974) (doctrine makes "pragmatic sense" and should be applied unless it destroys value of exclusionary rule).

160. *Leon,* 468 U.S. 897 (1984); *Sheppard,* 468 U.S. 981 (1984).

161. *See* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule,* 69 J. CRIM. L. & CRIMINOLOGY 635 (1978) (good faith exception is in step with trend of latest Supreme Court cases); Harris, *supra* note 26, at 48 ("Today, with the benefit of experience, the Supreme Court has begun to modify fourth amendment theory to avoid unjust results . . . and to accommodate the legitimate interest of society in protection from crime."); Van De Kamp, *The Good Faith Exception to the Exclusionary Rule—A Warning Letter to Prosecutors,* 26 S. TEX. L.J. 167, 174 (applauds *Leon* decision, but warns prosecutors, magistrates, and police to not abuse privilege so that the "door remains open" to allow for further advances in relaxation of exclusionary rule).

Several states had adopted a good faith exception through judicial legislation: ARIZ. REV. STAT. ANN. § 13-3925 (Supp. 1987), COLO. REV. STAT. ANN. § 16-3-308 (1986); or through judicial decision: United States v. Williams, 622 F.2d 830 (5th Cir. 1980). Also, the Attorney General's Task Force on Violent Crime argued 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." Attorney General's Task Force On Violent Crime, Final Rep. 55 (1981).

162. *See* Illinois v. Gates, 462 U.S. at 254 (1983) (White, J., concurring) (provided comprehensive and forceful argument for adopting good faith exception); United States v. Peltier, 422 U.S. 531, 542 (1975) ("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 [police] had knowledge, or may be properly charged with knowledge, that the search was unconstitutional . . . ."). In Michigan v. Tucker, 417 U.S. 433 (1974), the police informed respondent of his right to remain silent and of his right to counsel, but did not inform him of the fact that if he was indigent, he was entitled to free counsel. *Id.* at 436. The Court, in an opinion by Justice Rehnquist, held that the law does not require a perfect trial, only a fair one. Thus, by analogy, police cannot realistically be required to be perfect. *Id.* at 446. *See also* Brinegar v. United States, 338 U.S. 160 (1949) (application of exclusionary rule should depend

ordered re-argument on the issue of a good faith exception to the exclusionary rule, despite the fact that the issue was not presented by either party in the lower courts.[164] Nonetheless, the *Gates* majority, over the criticism of Justice White,[165] decided to leave the issue for another day, largely because such a decision would have represented a departure from established procedure.[166]

A year later, the Court officially adopted the good faith exception in the companion cases of *United States v. Leon*[167] and *Massachusetts v. Sheppard*.[168] In *Leon*, officers had obtained large quantities of drugs pursuant to a search of two residences, executed under a facially valid warrant.[169] The district court found that the search warrant lacked the requisite probable cause since the informant's tip was "fatally stale."[170] The court also held that the warrant failed to satisfy the two-pronged *Aguilar-Spinelli* test.[171]

Although Justices Brennan[172] and Stevens[173] both urged the Court to reverse and remand the case for a determination of probable cause based on its new "totality of the circumstances" test,[174] the Court, in an opinion by Justice White, chose instead to adopt the good faith exception to the exclusionary rule.[175] The Court began its analysis with the concept that the wrong condemned by the fourth amendment is "fully accomplished" by the unlawful search and seizure, and cannot be "cured" by exclusion.[176] The Court then proceeded to list all the costs of exclusion,[177] and described all the areas in which exclusion had been limited and those in which it failed to apply.[178]

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on gravity of offense, as well as whether police action was reasonable and executed in good faith).

163. 459 U.S. 1028 (1983).

164. *Id.*

165. 462 U.S. at 252 (White, J., concurring in judgment).

166. 459 U.S. 1028 (1983) (Brennan, J., dissenting) (since issue was not presented to the lower courts, deciding good faith issue in this case would represent a "flagrant" departure from established procedure).

167. 468 U.S. 897 (1984).

168. 468 U.S. 981 (1984).

169. 468 U.S. at 900-02.

170. *Id.* at 904.

171. *Id.* at 904-05.

172. 468 U.S. at 959 (Brennan, J., dissenting).

173. *Id.* at 961 (Stevens, J., dissenting). "[W]hen the Court goes beyond what is necessary to decide the case before it, it can only encourage the perception that it is pursuing its own notions of wise social policy, rather than adhering to its judicial role." *Id.* at 963.

174. *See supra* note 67.

175. "We have concluded that, in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions." 468 U.S. at 905.

176. *Id.* at 906 (citations omitted).

177. The "substantial societal costs" of exclusion include: impeding the fact-finding function of the judge or jury by not allowing the introduction of reliable evidence; interfering with the criminal justice system insofar as criminals go free or receive reduced sentences; and, generating disrespect for the "administration of justice." *Id.* at 907-08 (citations omitted).

178. *Id.* at 909-13. The Court relied on the following cases: United States v. Johnson, 457

Following the balancing approach adopted in *Calandra*, the Court held that evidence obtained by police pursuant to a facially valid warrant which is later held to be invalid due to a lack of probable cause should not be suppressed if the officer in good faith believed the warrant to be sufficient.[179] The standard applied is an objective one.[180] In *Sheppard* the exception was extended to include warrants determined to be invalid due to a technical insufficiency.[181]

Justice White stressed that the sole purpose of the exclusionary rule was to deter police abuses.[182] Anticipating the argument that magistrates might purposely issue invalid warrants on the belief that the evidence will not be suppressed due to the exception, he stressed that "there is no evidence suggesting that judges and magistrates are inclined to ignore or subvert the fourth amendment."[183] Holding that good faith is to be measured by an objective standard,[184] Justice White listed several examples which are not covered by the good faith exception: when the supporting affidavit contains false statements or misrepresentations;[185] when the warrant is so lacking in indicia of probable cause or so facially deficient that an officer cannot reasonably presume it to be valid;[186] or when the issuing magistrate has abandoned his judicial role.[187]

Justice Brennan wrote a scholarly and blistering dissent re-affirming his conviction that the exclusionary rule is not merely a judicially created remedy, but rather an essential part of the fourth and fourteenth amendments.[188]

U.S. 537 (1982) (no decisions marking "clear break with the past" will have retroactive application); Michigan v. DeFillippo, 443 U.S. 31 (1979) (when arrest is made on good faith reliance of statute that is subsequently held invalid); Rakas v. Illinois, 439 U.S. 128 (1978) (only victims of unconstitutional behavior have standing to challenge legality of a search); Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus proceedings); *Janis*, 428 U.S. 433 (1976) (federal civil cases using state illegally seized evidence); Brown v. Illinois, 422 U.S. 590 (1975) (when link between illegal behavior and evidence becomes too attenuated as to dissipate taint); *Calandra*, 414 U.S. 338 (1974) (grand jury proceedings); Alderman v. United States, 394 U.S. 165 (1969) (conspiracy cases).

179. 468 U.S. at 913.

180. *Id.* at 919 n.20 ("We emphasize that the standard of reasonableness we adopt is an objective one.").

181. 468 U.S. at 988. The police were unable to find the proper warrant form since the local court was closed, and were forced to use a controlled substance warrant of another town. The issuing magistrate had assured the police officer that the proper changes had been made. *Id.* at 985-86.

182. *Leon*, 468 U.S. 916 (1984).

183. Since, as the Court asserts, judges have no stake in the outcome of a criminal case, "[t]he threat of exclusion thus cannot be expected significantly to deter them." *Id.* at 917.

184. *Id.* at 919 n.20.

185. *Id.* at 923. *See* Franks v. Delaware, 438 U.S. 154 (1978).

186. *Leon*, 468 U.S. at 923.

187. *Id.*

188. 468 U.S. at 930. ("A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence

Justice Brennan presented an analysis of the development of the exclusionary rule and rebutted all of the majority's criticisms.[189] He concluded by listing three serious consequences of the Court's decision to adopt a good faith exception. First, it announces to issuing magistrates that their decisions to issue invalid warrants will be effectively "insulated" from review on appeal and thus, less care will be devoted to the warrant process itself.[190] Second, the exception will not effectively deter police, since their conduct will be upheld whenever objectively reasonable.[191] Finally, the standard will rarely offer greater flexibility than *Gates,* and as the two concepts overlap, the courts must "entertain the mind-boggling concept of an objectively reasonable reliance upon an objectively reasonable warrant."[192]

The *Leon* decision has since been applauded by commentators[193] and adopted by federal courts.[194] Although some state courts have explicitly refused to adopt a good faith exception,[195] its harshest attacks have come mainly from scholars and commentators.[196] Critics fear that the probable

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rationale."). *See also* Note, *The Good Faith Exception to the Exclusionary Rule Under the Fourth Amendment:* United States v. Leon *and* Massachusetts v. Sheppard, 19 SUFFOLK U.L. REV. 977 at 998-99 (1985) ("The landmark *Leon* decision is the antithesis of the much stronger view, expressed in the earlier cases, that the suppression doctrine is grounded in the [Constitution].").

189. 468 U.S. at 932-43.

190. *Id.* at 956.

191. *Id.* at 957.

192. *Id.* at 958-59.

193. *See supra* note 161.

194. *See, e.g.,* United States v. Spilatro, 800 F.2d 959 (9th Cir. 1986) (court followed *Leon,* but evidence was still suppressed since officers cannot reasonably rely on validity of warrant authorizing search for evidence in violation of stated statutes); United States v. Washington, 782 F.2d 807 (9th Cir. 1986) (warrant held to be so facially deficient that any reliance on it would be unreasonable, thus, evidence was suppressed despite the circuit's adherence to *Leon* doctrine); United States v. Accardo, 749 F.2d 1477 (11th Cir. 1985) (although warrant authorized seizure of "all corporate records," thus subsequently being held invalid as a general warrant, appellate court remanded case to district court for a finding on issue of whether good faith reliance by executing officers was reasonable); United States v. Haley, 758 F.2d 1294 (8th Cir. 1985) (part of warrant authorizing search of a residence was held invalid, but evidence was not suppressed because court found officers' reliance reasonable).

195. *See, e.g.,* State v. Novembrino, 200 N.J. Super. 229, 491 A.2d 37 (1985) (rejected *Leon* doctrine for three main reasons: (1) it eliminates review of probable cause; (2) it "fosters a careless attitude toward details by the police and issuing [magistrates]," and; (3) to preserve judicial integrity). People v. Bigelow, 66 N.Y.2d 417, 422, 488 N.E.2d 451, 458 (1985) (refusing to adopt *Leon* doctrine on state constitutional grounds, and asserting that exception completely frustrates exclusionary rule's purpose since "a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future").

196. *See* Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility,* 60 IND. L.J. 287 (1985); Hunter, *Is the Exclusionary Rule a Relic of the Past?* Leon, Sheppard *and "Beyond,"* 12 OHIO N.U.L. REV. 165; Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond,* 69 IOWA L. REV. 551 (1984); Mertens & Wasserstrom, *supra* note 17; Misner, *Limiting* Leon*: A Mistake of Law Analogy,* 77 J. CRIM. L.& C. 507 (1986).

cause requirement will be diluted,[197] that fourth amendment law will stagnate,[198] and that the language in *Leon* will "sow the seeds for a rapid and broad expansion" of the doctrine.[199]

Indeed, these fears were well-founded, as demonstrated when the Court further extended *Leon* in the 1987 case of *Illinois v. Krull*.[200] In *Krull*, state officials visited an auto wrecking yard pursuant to an Illinois statute requiring auto and auto parts sellers to allow inspection of their records.[201] Since the yard did not have any records, the official conducted a warrantless search of the yard, which produced four stolen cars.[202] Although the statute was declared unconstitutional, the evidence of the search was allowed. The Court drew an analogy between *Krull* and *Leon* regarding the deterrent effect of the application of the exclusionary rule. The Court held that suppressing evidence seized pursuant to a facially valid statute has no deterrent effect on the legislature.[203] Thus, unless a statute is clearly unconstitutional, the good faith exception protects those police officers who comply with it.[204]

Since *Calandra*,[205] the majority of the Court has demonstrated its hostility to the exclusionary rule by defining its purpose in a narrow fashion and using a cost-benefit test. This approach provided the justification for *Leon*, and can easily be extended to warrantless searches and seizures.[206] Such an extension will further weaken the protections of the fourth amendment and will make the exclusionary rule an ineffective and arbitrary remedy.[207]

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197. *Novembrino*, 200 N.J. Super. at 238, 491 A.2d at 42 ("Noncompliance with the probable cause requirement is not a mere sophisticated technicality which can be regarded as insubstantial. . . . Probable cause is the single most important consideration when determining whether an individual's privacy has been lawfully invaded.").

198. *See* Stewart, *supra* note 14, at 1400; Note, United States v. Leon *and* Massachusetts v. Sheppard: *Good Faith, the Fourth Amendment, and the Exclusionary Rule*, 30 ST. LOUIS U.L.J. 227, 251 (1985).

199. *See* Bacigal, *An Alternative Approach to the Good Faith Controversy*, 37 MERCER L. REV. 957 (1986).

200. 107 S. Ct. 1160 (1987).

201. *Id.* at 1163-65.

202. *Id.*

203. *Id.* at 1167. The majority, per Justice Blackmun, reasoned that any difference between *Leon* and *Krull* would rest on whether or not there would be any deterrent effect on the legislative branch by the use of the exclusionary rule. Blackmun concluded that like the judiciary, the legislative branch is not the focus of the rule, and thus it would not be deterred by suppression. *Id.* at 1167-68.

204. *Id.* at 1167.

205. 414 U.S. 338 (1974).

206. Dripps, *Living with* Leon, 95 YALE L.J. 906, 944-46 (1986). After warning that good faith may easily be extended to warrantless search[es], Professor Dripps argues that there are "sound analytical and catagorical objections" to such an extension. First, the "dilution" of "existing standards" would lead to "speculative searches," second, the warrant process itself would become less attractive, and finally, judicial review would be sacrificed in this area since the exception would "withdraw judicial scrutiny from a class of executive actions that are concededly illegal." *Id.* at 945-47.

207. Duke, *Making Leon Worse*, 95 YALE L.J. 1405, 1423 (1986).

III. THE *GARRISON* CASE

A. Facts Of Garrison

The Baltimore police obtained a warrant to search the person and apartment of Lawrence McWebb, after having received a tip from a reliable informant[208] that McWebb was a drug dealer known as "Red Cross."[209] The affiant, Detective Marcus, corroborated the information by visiting the suspect's premises and making an external inspection.[210]He called the Baltimore Gas & Electric Company, which verified that the third floor premises, located at 2036 Park Avenue, was occupied by McWebb.[211] The detective also checked with the Baltimore Police Department, which verified the address, and discovered then that McWebb had a previous criminal record.[212]

Although Marcus was aware of the multi-unit character of the building,[213] the trial court found that he reasonably believed the entire third floor was occupied by McWebb alone.[214] Upon executing the warrant, however, the warrant was found to be overbroad insofar as it authorized the search of the entire third floor.[215] Detective Marcus and five other officers split into two groups upon arriving at the third floor landing[216] and, although both McWebb and Garrison were present,[217] searched both apartments.[218] Upon

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> "Unless the Court can be persuaded that *Calandra's* incremental-deterrence-has-no-value approach is wrong, its continued application will ultimately produce the conclusion the Court began to construct in *Calandra*: There is so little left of the exclusionary rule, it makes no sense to retain it; its application is about as arbitrary and unpredictable depending on your perspective, as being struck by lightning or winning the lottery. *Leon* almost gets us there."

Id.

208. The informant had been instrumental in the successful prosecution of eight search and seizure cases and had purchased marijuana from McWebb at this third floor apartment. 473 A.2d 514, 515 (Md. Ct. Spec. App. 1984).

209. *Id.* The warrant stated:

> Affidavit having been made before me by Detective Albert Marcus, Baltimore Police Department, Narcotic Unit, that he has reason to believe that on the person of Lawrence Meril McWebb . . . [and] that on the premises known as 2036 Park Avenue third floor apartment, described as a three-story brick dwelling with the numerals 2-0-3-6 affixed to the front of same in the city of Baltimore. . . .

App. 46 at 9.

210. *Garrison,* 107 S. Ct. at 1015.

211. *Garrison,* 303 Md. 385, 494 A.2d 193 (Md. 1985).

212. *Id.* at 387, 484 A.2d at 193-94.

213. 107 S. Ct. at 1023 n.4 (Blackmun, J., dissenting).

214. 58 Md. App. at 430, 473 A.2d at 518.

215. *Id.* at 515.

216. Police testified that upon entering the third floor foyer, Garrison was standing in a body cast and pajamas and that the doors to the right and to the left were open. *Id.* at 516.

217. There was no necessity to break into the apartment, since McWebb arrived shortly before the execution of the warrant. *Id.* at 515-16.

218. The dissent points to the fact of an initial security sweep as a factor which works against judging the police officer's mistake as "reasonable." 107 S. Ct. at 1026.

discovering that they were mistakenly searching an additional apartment not intended by the warrant, the police stopped their search of Garrison's apartment, but only after contraband was seized. The contraband formed the basis for convicting Garrison of violating the Maryland Controlled Substances Act.[219]

The trial court made 11 findings of fact.[220] The Court held that the search was valid under the exception for multi-units when the character of the building is not known.[221] The intermediate appellate court affirmed on the same grounds, stressing that the crucial issue was whether the police made a good faith effort to describe the premises.[222]

The Maryland Court of Appeals held that the warrant authorized the search of only McWebb's apartment and reversed.[223] The court stressed that under Article 26 of the Maryland Declaration of Rights,[224] which is *in pari materia* with the fourth amendment,[225] general warrants are illegal.[226] Since the warrant only authorized the search of McWebb's apartment, and since no exigent circumstances existed to justify the search of Garrison's apartment, the entry and search of Garrison's apartment could not be sustained.[227] Addressing the exception relied on by the lower court to justify the police error, the Court of Appeals held that the exception only applies when the officers have no reason to know the character of the building,[228] and only when the right premises are searched.[229] The Supreme Court granted certiorari

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219. 107 S. Ct. at 1015.

220. 58 Md. App. at 422-24, 473 A.2d at 517-18. There was a great deal of contradictory testimony presented to the court. For example, the police claimed that the apartments were not marked, but a photograph was introduced into evidence showing "3F" and "3R" on the door jambs. *Id.* at 516. Also, the police insist that neither McWebb nor Garrison attempted to warn them of separate apartments, yet, McWebb claimed that he told detective Marcus that he lived in the "third floor rear" apartment. *Id.* at 516-17.

221. *Id.* at 519.

222. The court stated that "[i]n this case we are concerned with . . . what the police knew or should have known." *Id.*

223. "The warrant in the instant case precisely and unambiguously described the premises to be searched: McWebb's apartment. The police then expanded the search to a second apartment not described or mentioned in the warrant." 303 Md. at 395, 494 A.2d at 198.

224. Maryland Declaration of Rights, Article 26 states:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

MD. CONST. art. 26.

225. 303 Md. at 391, 494 A.2d at 196.

226. *Id.*

227. *Id.* at 394, 494 A.2d at 197.

228. *Id.*

229. *Id. Accord* United States v. Ofshe, 817 F.2d 1508, 1514 (11th Cir. 1987) ("In the final analysis, the agents followed exactly the authority of the warrant in that they searched only the two safes [in the targeted premises]" even though such premises were not clearly defined

since the decision was based on an interpretation of fourth amendment law.

B. *The Majority's Analysis*

The Supreme Court framed its inquiry in the form of two issues: 1) the validity of the warrant *vis-a-vis* the specificity requirement,[230] and 2) whether the officer's good faith mistake in the execution of the warrant violated Garrison's constitutional rights.[231] In judging the validity of the warrant, the Court conceded that the warrant was ambiguous in scope, but that it must be considered in light of the facts that Marcus disclosed, or that Marcus had a duty to discover and disclose to the issuing magistrate.[232] The Court held that a valid warrant could not be invalidated by information discovered after the warrant was issued.[233] Therefore, the resolution of the issue focused on the information that was available to the affiant of the warrant at the time the warrant was requested.[234] The Court agreed with all three Maryland courts that, based on objective facts, the officer reasonably believed McWebb occupied the entire third floor,[235] and concluded that the warrant was valid.[236]

As to the execution of the warrant, the Court relied on *Hill v. California,*[237] and held that an officer's reasonable failure to appreciate that a valid warrant describes the premises to be searched too broadly is allowable under *Hill.*[238] The Court recognized the need to allow for good faith mistakes made by police in the performance of their duties.[239] Since the objective facts available to the police suggested no distinction between McWebb's apartment and the entire third floor premises, the officers' execution was reasonable under either interpretation of the warrant.[240]

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in search warrant); United States v. Fuccillo, 808 F.2d 173, 176 (1st Cir. 1987) (determining sufficiency of description of warrant by analyzing whether there are sufficient facts to establish that evidence will be at the place to be searched, and extent to which warrant is able to guide executing officer in distinguishing targeted items from other items); United States v. Heldt, 668 F.2d 1238, 1265-66 (D.C. Cir. 1981) (although office not listed in warrant was searched, no evidence from that seizure was used against any party, even though court held search was reasonable and in good faith).

230. *Garrison,* 107 S. Ct. at 1017.

231. *Id.*

232. *Id.* at 1018.

233. *Id.* "Just as the discovery of contraband cannot validate a warrant invalid when issued, so it is equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant." *Id.*

234. The Court acknowledged that arguments could be made regarding whether Marcus should have taken further steps to ascertain the character of the third floor. *Id.* at n.10.

235. *Id.*

236. *Id.* at 1018.

237. 401 U.S. 797 (1971).

238. 107 S. Ct. at 1019. "While *Hill* involved an arrest without a warrant, its underlying rationale that an officer's reasonable misidentification of a person does not invalidate a valid arrest is equally applicable to an officer's reasonable failure to appreciate that a valid warrant describes too broadly the premises to be searched." *Id.*

239. *Id.*

240. *Id.*

C. The Dissent

Justice Blackmun, joined by Justices Brennan and Marshall, dissented and stressed that the warrant limited the search to only McWebb's apartment,[241] and that the search was expanded to Garrison's apartment absent exigent circumstances or a warrant.[242] First, the dissent argued that the home has always received special protection under the fourth amendment and that absent exigent circumstances, a warrantless entry into a home is *per se* unreasonable.[243] Justice Blackmun stressed that the specificity requirement is mandated by the fourth amendment in order to limit the scope of the search; warrants deficient in this requirement are held to be invalid.[244]

The dissent next turned to the majority's justification of the warrant and the *Garrison* search in terms of good faith mistake.[245] The precedential value of *Hill* was questioned, because the evidence the police obtained in that case under an "honest mistake of fact" was used against the intended target of the arrest.[246] The dissent also discredited the trial court's use of the "character unknown" exception to the particularity-of-description requirement of multi-units.[247] Since the officers were aware that the structure under suspicion was a multi-unit building, the dissent argued, they therefore *did* have notice of the potential for more than one unit per floor.[248] Even if such a reasonable mistake was allowed as an exception to the warrant requirement, it is doubtful that either the investigation prior to obtaining the warrant,[249] or the search[250] was reasonable in light of the facts.[251]

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241. *Id.* at 1020 (Blackmun, J., dissenting). The dissenters did not find the warrant ambiguous. "The words of the warrant were plain and distinctive: the warrant directed the officers to seize marijuana and drug paraphernalia on the person of McWebb and in *McWebb's* apartment. . . ." *Id.* at 1021 (emphasis included).

242. 107 S. Ct. at 1020.

243. *Id.* at 1020-21.

244. *Id.* at 1021.

245. *Id.* at 1022. "Because the Court cannot justify the officers' search under the 'exceptional circumstances' rubric, it analyzes the police conduct here in terms of 'mistake.'" *Id.*

246. *Id.* at 1022-23. "It may make some sense to excuse a reasonable mistake by police that produces evidence against the intended target of an investigation or warrant if the officers had probable cause for arresting that individual or searching his residence. Similar reasoning does *not* apply with respect to one whom probable cause has not singled out and who is the victim of the officer's error." *Id.* at 1023.

247. *See* 58 Md. App. at 432-33, 473 A.2d at 520-21.

248. 107 S. Ct. at 1023 n.4 (Blackmun, J., dissenting).

249. Although Marcus knew that the building in question was a multi-unit structure, he did not go inside to check the mailboxes, or ask the informant if more than one apartment was located on the third floor. *Id.* at 1024. Also, the dissent argued that the officer could have inquired with other utility companies, since given the nature of the structure, "the detective's inquiry of the gas company should not have relieved him of the obligation to pursue other, less burdensome steps. . . ." *Id.* at 1024 n.6.

250. The dissent stresses that the officers should have become aware of the existence of two separate apartments well before the evidence was found. *Id.* at 1025. Both McWebb and Garrison were present, and none of the executing officers asked if there were more than one

III. ANALYSIS

As *Garrison* indicates, the fear that the "good faith" exception to the exclusionary rule would result in the stagnation of fourth amendment law[252] was not groundless. Although the Court did not allow the admission of the evidence under the *Leon* doctrine, it analyzed both the validity of the warrant and its execution in terms of objective reasonableness, rather than by addressing the underlying fourth amendment issues. In so doing, the Court allowed a warrantless entry and search into a home, and diluted the specificity requirement of the warrant process. Yet, after *Leon,* the Court could have admitted the evidence based on the officers' "good faith" reliance on a facially valid warrant, and then proclaimed the warrant invalid. Thus, the Court could have reached the same result while leaving the specificity requirement intact, and adhered more closely to precedent.[253]

A. The Warrantless Entry Into Garrison's Apartment

As the dissent and the Maryland Court of Appeals pointed out, the language "third floor apartment" in the context of a search warrant for McWebb's premises in a multi-unit building clearly authorized the search of only McWebb's apartment.[254] Any intrusion to another unit must be justified by a warrant,[255] consent,[256] or exigent circumstances.[257]

The Court could not justify the entry into Garrison's apartment under any established exception to the warrant requirement, therefore, it chose to

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apartment on the third floor. *Id.* at 1025-26. Also, the police conducted an initial security sweep before the search, and the facts show that during this sweep their error could have been discovered. *Id.* at 1026.

251. *Id.* at 1026. *See* Bell v. Wolfish, 441 U.S. 520 (1979). The test of reasonableness is not easily defined. The *Bell* Court stated:

> [i]n each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559.

See also United States v. Votteler, 544 F.2d 1355, 1363-64 (6th Cir. 1976). When a search is directed at a multi-unit structure, police must consider "external indicia" such as door bells, mailboxes and utility meters, and make a reasonable effort to ascertain the correct premise or else they cannot claim "honest mistake." *Id.*

252. *See supra* note 195.

253. *See supra* note 196.

254. 107 S. Ct. at 1021 (Blackmun, J., dissenting).

255. *See supra* note 49.

256. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

257. United States v. Karo, 468 U.S. at 714-15 ("Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances."). According to the facts in the *Garrison* case, the officers saw marijuana atop Garrison's dresser during the initial security sweep. The dissent suggests that after seeing such, they could have secured the apartment and sought a search warrant for Garrison's apartment as well. 107 S. Ct. at 1026 n.11 (Blackmun, J., dissenting).

rely on *Hill*[258] to support its view that the police must be afforded some "latitude" for good faith mistakes.[259] In *Hill,* the police had probable cause to arrest Hill, obtained an arrest warrant and went to Hill's apartment to execute the warrant. Hill was not present, but his friend, Miller, who matched Hill's description was present. The police, believing Miller to be Hill, arrested Miller and conducted a search pursuant to that arrest.[260] Upon learning of their mistake, Miller was released, but Hill was prosecuted with the evidence obtained from the search.[261] The Court held that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment"; because the police officer's mistake was reasonable, the arrest was valid, and thus the evidence found incident to that arrest was not suppressed.[262]

Other courts have also used the *Hill* analysis to admit evidence seized as a result of an objectively reasonable mistake by police.[263] Yet, this reasoning has not been applied to justify a warrantless entry and search of a home against an unintended target of the search.[264] After *Garrison,* "reasonable mistake of fact" can be added to the list of exceptions in warrantless searches and seizures in a home.

B. The Validity Of The Warrant

As described earlier in the Casenote, the particularity-of-description requirement necessarily limits the scope of a search, since law enforcement officials must have probable cause to believe evidence is at the place to be searched before the warrant is issued.[265] When such warrants authorize the search of a multi-unit structure, the general rule is that the warrant must be sufficiently particular in order to preclude the search of other units.[266] Unless

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258. 401 U.S. 797.

259. 107 S. Ct. at 1018-19.

260. 401 U.S. at 799-800. *Hill* was a pre-*Chimel* incident, thus, the police, having probable cause to arrest Hill for an armed robbery, went to his residence and found Miller. Miller fit the description of Hill so the police put him under arrest, despite his protests to the contrary, and conducted an extensive search incident of that arrest. *Id.*

261. *Id.* at 801.

262. *Id.* at 804.

263. *See, e.g.,* United States v. Glover, 725 F.2d 120 (D.C. Cir.), *cert. denied,* 466 U.S. 905 (1984). In *Glover,* defendant was arrested by the F.B.I. because he was mistaken for one Mathis, and the subsequent frisk produced a gun. *Id.* at 122. The court held that the arrest was valid under *Hill,* since the police had probable cause to arrest Mathis, and they reasonably believed Glover to be Mathis. *Id.* at 122-23. *See also* United States v. Allen, 629 F.2d 51 (D.C. Cir. 1980). In *Allen,* the defendant was arrested for drinking in a public place, and the subsequent search produced heroin. *Id.* at 53. The defendant challenged the initial arrest on the grounds that he was standing in an area encompassed by a nearby catering service's liquor license. *Id.* The court held that the officer's mistake was reasonable, and he was acting under the basis of observable facts, not mere suspicion. *Id.* at 55-56.

264. *Garrison,* 107 S, Ct. at 1023 (Blackmun, J., dissenting).

265. *See supra* note 68.

266. Annotation, *supra* note 77.

one of the well-defined exceptions apply,[267] the warrant, as well as the subsequent search, is held to be invalid.

The facts indicate that the Court could possibly have used the "common use" exception to the particularity-of-description requirement, because it appears that McWebb and Garrison had equal access to each other's apartments.[268] Or the Court could have adopted the trial court's analysis of the *Santore* exception,[269] and held that even though the character of the building was known, the exception would apply since the character of the third floor was not known. However, this analysis does have its problems, since the *Santore* exception has only been held to apply when the proper unit is searched.[270] Following this approach would have represented a large expansion of this exception.

Instead of using one of the above exceptions, the Court relaxed the specificity of description requirement of a search warrant. The Court conceded that the warrant was subject to two different interpretations and therefore was ambiguous in scope.[271] While an ambiguous warrant is invalid, the Court nonetheless found the ambiguous warrant in the *Garrison* case valid. Such a departure from the general rule necessarily relaxes the standard for the specificity requirement, which is arguably the cornerstone of the warrant process and an instrument for protection against fourth amendment violations.[272]

C. *"Good Faith" As An Alternative Analysis*

The best approach for the Court to have taken in the *Garrison* case to uphold Garrison's conviction and abide by settled precedent, would have been to follow the recent precedent of *Leon*.[273] As Professor LaFave argues, "whether the description in the warrant in fact was constitutionally adequate is no longer determinative on the suppression issue."[274] Unless the warrant is so facially deficient that an officer could not reasonably rely on its validity, the search would be upheld due to the officer's good faith reliance on its validity.

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267. *See supra* notes 78-81 and accompanying text.

268. The Court of Special Appeals seems to have preferred this argument: "The court in the present case, we decide, could reasonably conclude that both persons seemed to be making themselves at home throughout the third floor." 473 A.2d at 522. Also, while the officers were in Garrison's apartment, the phone rang, and the caller asked for "Red Cross," McWebb's alias. *Id.* at 518.

269. "It appears that, when ruling upon the propriety of the search, the trial judge in this case had such an exception in mind." *Garrison,* 107 S. Ct. at 1023, n.4 (Blackmun, J., dissenting).

270. *See Santore,* 290 F.2d 51 (2d Cir. 1960).

271. *Garrison,* 107 S. Ct. at 1018.

272. *See supra* note 68.

273. 468 U.S. 897 (1984).

274. 2 W.R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 207 (2d ed. 1987).

If the belief that McWebb occupied the entire third floor was reasonable, as the majority so adamantly argues, the "good faith" reliance on the warrant itself could be adjudged reasonable. The subsequent invalidation of the warrant due to a deficiency in the description of the place to be searched would therefore not require the suppression of the seized evidence. Such an approach is possible under the "good faith" exception, and the sufficiency-of-description requirement would have been left intact.

IV. IMPACT

After *Garrison,* it is questionable whether the home still holds the "special protection"[275] under the fourth amendment that it has long enjoyed. If *Garrison* is an indication of the Court's current position, the answer to this question would appear to be negative, since the Court has easily given a *post hoc* justification for the entry and search of a residence for which no probable cause to search existed.[276] As one commentator has noted, the Court maintains that searches pursuant to defective warrants violate the fourth amendment, yet the Court is unwilling to supply a remedy.[277]

The Court's decision in *Garrison* undoubtedly expands the good faith exception to the warrant requirement by its use of good faith mistake to justify the warrantless entry and search of Garrison's apartment. One of the major fears held by opponents of the good faith exception to the exclusionary rule is that courts will look at the reasonableness of a police officer's behavior rather than at the underlying fourth amendment issues.[278] Indeed, the majority in *Leon* held that courts should turn immediately to a consideration of the officer's good faith unless the case presents an "important" fourth amendment question.[279]

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275. *See supra* note 50.

276. *See, e.g.,* Llaguno v. Mingey, 739 F.2d 1186, 1191 (7th Cir. 1984) (executing officers needed to establish probable cause, which they did not have according to court, before entering home; this illegality cannot be cured by information later procured after entry and search), *rev'd on other grounds,* 763 F.2d 1560 (7th Cir. 1985).

277. Dripps, *supra* note 205, at 934. "For all practical purposes, a search unsupported by probable cause but pursuant to a facially valid warrant is now legal." *Id.*

278. *See generally* LaFave, *The Seductive Call of Expediency,* 1984 U. ILL. L. REV. 895 (Court has justified following course of expediency by using over-stated costs, understated benefits, and ignoring imperative of judicial integrity); Duke, *supra* note 206, at 1422 ("[*Leon*] was merely a mild progression in the process of gutting the Fourth Amendment.").

The issue should not be how warrants are viewed in hindsight, but how they were viewed by those executing them. Justice Brennan argued that "[t]he Court's attempt to cure this defect by *post hoc* judicial construction evades principles settled in this Court's Fourth Amendment decisions." Andresen v. Maryland, 427 U.S. 463, 493 (1976) (Brennan, J., dissenting).

279. United States v. Leon, 468 U.S. 897, 925 (1984). The lower courts have been left the option of resolving the underlying fourth amendment issue or turning directly to a good faith analysis. However, the Court stated "[w]e have no reason to believe that our Fourth Amendment jurisprudence would suffer by allowing reviewing courts to exercise an informed discretion in making this choice." *Id.*

However, the question remains: what exactly is an "important" fourth amendment question? In *Leon,* Justice White listed several examples of cases in which "important" fourth amendment questions are presented: 1) if the "resolution" of a fourth amendment question is "necessary to guide future action by law enforcement officers and magistrates"; 2) if good faith is difficult to determine without first turning to the fourth amendment question; and 3) when magistrates need to be "informed of their errors" by the resolution of a fourth amendment question.[280] These situations listed by Justice White are vague, subject to interpretation, and set no clear standards to guide the lower courts in resolution of fourth amendment claims.

The *Garrison* case is a good example of an "important" fourth amendment question under all three of the situations listed above. Although not decided under *Leon,* the majority's analysis was one of reasonableness and good faith mistake. The underlying fourth amendment issues such as the validity of the warrant and the warrantless entry into Garrison's apartment were not addressed under traditional fourth amendment analysis. Yet the resolution of these issues would surely provide necessary guidance to police officers in obtaining information of the intended premises, especially when a multi-unit building is involved. Also, as the dissent points out, it is questionable whether the police acted in good faith.[281] A resolution of the fourth amendment issues would assist in this determination. Finally, the Court's focus on reasonableness gives absolutely no guidance to magistrates in evaluating the particularity-of-description requirement. An ambiguous warrant was found to be specific, thus relaxing the requirement, yet new guidelines have not been provided by the Court.

If a case does not present an "important" fourth amendment question, the court will have to look at the actions of the police and consider all relevant facts to determine whether or not the search and seizure was objectively reasonable. Yet, questions remain as to what standard of objectivity should be used, and how much investigation is "reasonable" thus, bringing the warrant within the good faith mistake exception.[282] The Court has given no indication of whether the standard should be that of a "reasonable man" as in tort law, or that of a reasonable police officer, with or without fourth amendment law training, or whether the standard should be higher. The lack of an answer to this question poses the problem of whether a uniform national standard will be preferred over local standards, which differ according to available training and practices. It seems that only the most blatant of violations will be unprotected by good faith.[283]

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280. *Id.*

281. *See supra* notes 248 & 250.

282. Bernstein, *supra* note 1, at 93. "What is happening, you see, is that the constabulary across the nation is increasingly broadening the good-faith exception to the warrant requirement. The issue, of course, is *whose* good faith is the standard. It seems to me we are accepting the lowest common denominator among the police as the group setting the standard. Instead of raising our sights, we are lowering them." (emphasis in original).

283. In United States v. Palacios, 666 F. Supp. 1133 (S.D. Tex. 1987), the court interpreted

The line between evidence which is excludable and evidence which is not was appropriately drawn by *Weeks* and *Mapp*. Those cases defined the line of demarcation by differentiating between behavior that is constitutional and that which is unconstitutional. The "mildness," "honesty" or "inadvertentance" with which the acts are carried out should be irrelevent to fourth amendment inquiry because differentiating between degrees of seriousness will present unmanageable standards.[284] The *Garrison* case will no doubt have an effect on the standard for the investigation and preparation of a search warrant directed against an apartment in a multi-unit building. Traditionally, this standard has required a strict adherence to a clear description of the targeted unit in order to preclude the search of another residence.[285] As the case suggests, this standard has been relaxed.

Perhaps the most important question raised by *Garrison* is, to what extent may "good faith mistake" be used to circumvent the warrant requirement? If a warrant is obtained, its adequacy should not be judged apart from the underlying principles of the warrant requirement, which is the protection against arbitrary searches and seizures.[286] The warrant requirement places the judgment of the magistrate between the police and the public.[287] The latest decisions seem to indicate that the Court is moving away from the warrant approach of the fourth amendment and toward a reasonableness approach.[288] Rather than using the traditional analysis centered around the warrant requirement, the Court now evaluates a fourth amendment violation in terms of objective reasonableness.[289]

VI. CONCLUSION

Weeks[290] was the first and last unanimous decision by the Court with respect to the exclusionary rule. Since that time, the rule has undergone

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Garrison in order to determine whether the mistake of fact by the police was "objectively reasonable." The police arrested the defendant, Juan Palacios, Sr., and conducted a search of his home incident to that arrest. *Id.* at 114. The warrant authorizing the arrest, however, was for Juan Palacios, Jr., the son of the defendent. *Id.* The search produced a .38 caliber revolver which the defendent, a convicted felon, possessed unlawfully. *Id.* The court stated that the "ultimate issue in this case . . . is whether the mistake was a reasonable one." *Id.* at 115. Since the police had a picture of the defendent's son (who was in his early twenties) and the defendant was clearly in his forties, the court held that the mistake was not reasonable. *Id.*

284. Kamisar, *supra* note 17, at 83. "A court which admits the evidence in a case involving a 'run of the mill' Fourth Amendment violation demonstrates an insufficient commitment to the guarantee against unreasonable search and seizure." *Id.* at 83-84.

285. *See supra* note 71.

286. *See supra* note 68.

287. The Court has recognized the requirement as a necessary protection. *See* McDonald v. United States, 335 U.S. 451, 456 (1948)("[H]istory shows that the police acting on their own cannot be trusted.").

288. *See* Bloom, *supra* note 21, at 692-93.

289. Mertens & Wassertrom, *supra* note 17, at 372. "A distressingly broad range of misconduct will be excused under the good faith exception, for use of the exception will almost surely change the fourth amendment standard for searches and seizures from probable cause to general reasonableness." *Id.*

290. 232 U.S. 383 (1914).

drastic transformations, as the underlying asserted purpose is redefined. As commentators have correctly noted, the concept of judicial integrity no longer plays a role in the decision of whether or not evidence procured by an illegality should be suppressed.[291] This result is unfortunate, because the limited definition of the rule as a police deterrent has greatly narrowed the applicability of the exclusionary rule.

The *Garrison* decision is another step forward in disarming the remedial potency of the exclusionary rule. Although the search could have been upheld under the good faith exception, and the warrant declared invalid, the majority instead, in one stroke, upheld the validity of the warrant despite the deficiency in the description and the fact that the police entered Garrison's apartment without either consent or exigent circumstances.

One commentator recently noted that the government's war on drugs has resulted in an attack on "traditional protections afforded to criminal defendants under the Bill of Rights. . . . The United States is measurably a less free society than it was five or six years ago."[292] With decisions like *Calandra*, *Leon*, and now *Garrison*, this is certainly true today for a tenant in a multi-unit structure whose neighbor is suspected by the police of criminal activity.

Teresa J. Verges

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291. Sunderland, *supra* note 17, at 344.

292. Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HAST. L.J. 889, 895 (1987).