Washington Law Review

Volume 56 | Number 2

3-1-1981

In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel

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CONSTITUTIONAL LAW: SEARCH AND SEIZURE—THE ROLE OF POLICE OFFICER GOOD FAITH IN SUBSTANTIVE FOURTH AMENDMENT DOCTRINE—*Michigan v. DeFillippo*, 443 U.S. 31 (1979).

Called to investigate two persons allegedly appearing to be intoxicated, Detroit police officers encountered respondent Gary DeFillippo and a young woman in an alley.[1] When asked for identification, DeFillippo responded ambiguously[2] and was arrested[3] for violation of a city "stop-and-identify" ordinance. The ordinance declared unlawful a refusal by any person stopped under its authority to identify himself and to verify his identity.[4] DeFillippo was then searched and found to be carrying two small packages containing marijuana and phencyclidine, both controlled substances. He was subsequently charged with possesson of phencyclidine[5] rather than with violation of the stop-and-identify ordinance.

At a preliminary examination, DeFillippo's motion to suppress the evidence obtained in the search incident to his arrest was denied.[6] On interlocutory appeal, the Michigan Court of Appeals reversed, finding the stop-and-identify ordinance unconstitutionally vague, and the phencyclidine therefore the inadmissible product of an illegal arrest and search.[7] The Michigan Supreme Court denied leave to appeal.[8] In a six to three decision[9] on certiorari review, the United States Supreme Court reversed the

1. According to the officers, DeFillippo did not seem to be intoxicated. Brief for the Respondent at 7, Michigan v. DeFillippo, 443 U.S. 31, 33 (1979).

2. DeFillippo first stated that he was Sergeant Mash of the Detroit City Police Department, then changed his answer and said that he either worked for or knew Sergeant Mash. 443 U.S. at 33.

3. Michigan's General Arrest Statute permits an officer to arrest a suspect whom the officer has probable cause to believe has committed a criminal offense in his presence. MICH. COMP. LAWS ANN. § 764.15 (1970). *See* section III–*B infra*.

4. DETROIT, MICH., CODE § 39-I-52.3 (1976), *reprinted in* Brief for the Respondent at 5-6 n.7. The ordinance provided:

> When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity.

5. MICH. COMP. LAWS ANN. § 335.341(4)(b) (1970) (current version at MICH. COMP. LAWS § 333-.7401 (1979)).

6. Joint Appendix to Brief for the Petitioner and Brief for the Respondent at 14–15, Michigan v. DeFillippo, 443 U.S. 31 (1979).

7. People v. DeFillippo, 80 Mich. App. 197, 262 N.W.2d 921 (1977).

8. 402 Mich. 921 (1978).

9. Chief Justice Burger's majority opinion was joined by Justices White, Powell, Blackmun, Rehnquist, and Stewart. Justice Blackmun also filed a concurring opinion. Justice Brennan dissented in an opinion joined by Justices Marshall and Stevens.

state court of appeals.[10] The Court held that because the arrest was based on probable cause and effected in good faith reliance on a presumptively valid ordinance, it was lawful despite the later judicial determination that the ordinance was unconstitutional.[11] Having validated his arrest, the Court further held that DeFillippo was legally searched and that the contraband evidence should not have been suppressed.[12]

Chief Justice Burger's brief majority opinion belies the magnitude of fourth amendment doctrinal issues raised by the case. The Court did not simply decline to apply the exclusionary rule remedy. Rather, it struck at the core of fourth amendment privacy rights, for the first time utilizing police officer good faith reliance to deny the existence of a constitutional violation.[13]

This note challenges the Court's implicit assumption that a policeman's good faith reliance is relevant in determining whether the fourth amendment has been violated. That assumption is incompatible with precedent.[14] Prior decisions suggest good faith reliance should not be considered until after the court has established that a violation occurred and applicability of the exclusionary rule is at issue. Without offering a coherent explanation for its departure from precedent, the *DeFillippo* Court casually added police good faith to the already complex body of substantive search and seizure law. Thus, the decision created yet another dimension of disquieting uncertainty in the doctrine.[15] Moreover, the Court's deference to a police officer's good faith reliance on a substantive law encourages the use of sham substantive offenses to avoid fourth amendment limits. Finally, the Court's emphasis on good faith reliance may

10. Michigan v. DeFillippo, 443 U.S. 31 (1979).

11. *Id.* at 40.

12. *Id.*

13. *DeFillippo* was thus directly concerned with substantive constitutional rights and only derivatively with the question of remedy. The suppression sanction obviously cannot operate without a cognizable fourth amendment violation to trigger it.

14. *See* section I–*C infra*.

15. Judges and legal commentators have bemoaned the unpredictability and lack of clarity in fourth amendment jurisprudence. *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753, 771 (1979) (Blackmun, J., dissenting); Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring); United States v. Sutton, 341 F. Supp. 320, 322 (1972) (To "unwind" the Supreme Court's search and seizure cases "would require the mind of a medieval scholastic . . . ."); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979); Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973); LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255. For a brief historical survey of the major Supreme Court cases in the search and seizure area see CONGRESSIONAL QUARTERLY, INC., CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 539–53 (1979).

misdirect the lower courts, prompting them to substitute the judgments of those who enact and enforce the laws for the disinterested scrutiny of a magistrate.

I. BACKGROUND: THE FOURTH AMENDMENT, THE EXCLUSIONARY RULE, AND POLICE OFFICER GOOD FAITH

A. Fourth Amendment Rights

The Supreme Court has long maintained that the thrust of the fourth amendment[16] is "to safeguard the privacy and security of individuals against arbitrary invasions by government."[17] The Court has chosen what Professor Amsterdam labels an atomistic model: the amendment's fundamental purpose is not to control the police in all their confrontations with the citizenry, but to surround each individual with a sphere of private interest which may not be penetrated impertinently by the government.[18] As a first principle, then, the amendment is concerned with protecting personal rights rather than with regulating government generally.

There is an incidental regulatory dimension to the protectionist purpose

16. The cryptic language of the amendment, which has bred enormous controversy, reads:

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

U.S. CONST. amend. IV.

17. Camara v. Municipal Court, 387 U.S. 523, 528 (1967). *See also* Wolf v. Colorado, 338 U.S. 25, 27 (1949); Weeks v. United States, 232 U.S. 383, 393–94 (1914). This view of the fourth amendment's purpose emerged clearly in Boyd v. United States, 116 U.S. 616 (1886), where Justice Bradley, interpreting Lord Camden's famous denunciation of English general warrants in Entick v. Carrington, 19 Howell's State Trials 1030 (95 Eng. Rep. 807 (K.B. 1765)), stated:

> The principles laid down in [Lord Camden's] opinion affect the very essense of constitutional liberty and security . . . . They apply to all invasions, on the part of the Government . . . of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essense of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . it is the invasion of this sacred right which underlies and constitutes the essense of Lord Camden's judgment.

116 U.S. at 630.

18. Amsterdam, *supra* note 15, at 367–72. Professor Amsterdam's conclusion that an atomistic model has been adopted is based on the "standing" cases, which allow only those litigants whose *personal* privacy or liberty has been violated by the government the opportunity of moving to suppress incriminating evidence obtained as a consequence of the illegality. *See* Alderman v. United States, 394 U.S. 165, 174–75 (1969). *See also* Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 356–58 (1978) (noting that an atomistic concept of the fourth amendment was reflected in Katz v. United States, 389 U.S. 347 (1967), which held that the protective cover of the amendment extends only to the *individual's* legitimate expectations of privacy).

underlying the amendment.[19] Because it "guarantees to citizens . . . the absolute right to be free from unreasonable searches and seizures,"[20] the fourth amendment necessarily "operates as a limitation upon the exercise of federal power."[21] This concept of the amendment's purpose has provided the Court with a convenient, though largely unarticulated, basis upon which to detach the exclusionary rule, the primary "remedy"[22] available for breaches of the fourth amendment,[23] from the right to be secure against unreasonably intrusive government searches and seizures.

B. The Exclusionary Rule Remedy

Sixty-six years ago the Court mandated a rule of exclusion to deprive government of the benefits of evidence seized in violation of the fourth amendment.[24] Despite persuasive arguments that the exclusionary rule is an ingredient of fourth amendment substance[25] or, alternatively, "an in-

19. Wolf v. Colorado, 338 U.S. 25, 28–30 (1949). *See* Amsterdam, *supra* note 15, at 371; Burkoff, *supra* note 15, at 168.

20. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 392 (1971).

21. *Id.* And, by the fourteenth amendment due process clause, it has been extended to limit unduly intrusive exercises of state power. Mapp v. Ohio, 367 U.S. 643 (1961). *See* notes 28 & 29 *infra*.

22. The term "remedy" is used loosely in describing the exclusionary rule, since the rule is not applied by the Court in the true sense of aiding or compensating the victim of an illegal search or seizure. Rather, its aim is to deter future violations by punishing the government for exceeding constitutional limits. Since the rule results in suppression of reliable, probative evidence at trial, however, its application has an inevitable compensatory dimension from the perspective of the criminal defendant. *See generally* United States v. Calandra, 414 U.S. 338, 347–48 (1974); Elkins v. United States, 364 U.S. 206, 217 (1961); Coe, *The A.L.I. Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GEORGIA L. REV. 1, 13 (1975); Yackle, *supra* note 18, at 417. Although alternatives to the exclusionary rule exist, including civil suits for damages and/or injunctive relief, and criminal proceedings against offending officers, it is conceded that they are not generally available. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415–16 (1971) (Burger, C.J., dissenting); Amsterdam, *supra* note 15, at 429–30; Yackle, *supra* note 18, at 416.

23. For a stern criticism of the Court's analytic separation of right and remedy in fourth amendment jurisprudence, see Burkoff, *supra* note 15.

24. Weeks v. United States, 232 U.S. 383 (1914). *Weeks* established an exclusionary rule for federal criminal cases. The rule was later imposed on the states. *See* note 21 *supra*.

25. Justice Day's majority opinion in *Weeks v. United States* strongly implies that the exclusionary rule was viewed at its inception as part and parcel of fourth amendment guarantees. The rule was justified as vindicating the victim's paramount right of privacy and preventing a further deprivation of his constitutional rights. 232 U.S. 383, 393, 394, 398 (1914). Justice Brennan has more recently echoed that contention. *See, e.g.*, United States v. Janis, 428 U.S. 433, 460 (1976) (Brennan, J., dissenting). *See also* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT. A STUDY IN CONSTITUTIONAL INTERPRETATION 77–79 (1966); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Sunderland, *The Exclusionary Rule:*

dispensable remedial dimension of the underlying guarantee,"[26] and thus available to the same extent as the fourth amendment itself,[27] the Court has more recently concluded that the sanction is purely a prophylactic, judicially conceived rule of evidence.[28] The doctrinal separation of right and remedy, first utilized in *Wolf v. Colorado*,[29] has allowed the Court to impose limits on the scope of the exclusionary rule. Time and again the Court has denied suppression despite finding (or assuming) a violation of the fourth amendment.[30]

The Court has identified deterrence of police misconduct, a regulatory

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A Requirement of Constitutional Principle, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978); Yarbrough, *The Flexible Exclusionary Rule and the Crime Rate*, 6 AM. J. CRIM. L. 1 (1978).

26. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 24 (1975).

27. *Id. See also* United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting); Burkoff, *supra* note 15, at 187; Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1548–49 (1972); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1111–12 (1969).

28. United States v. Janis, 428 U.S. 433, 446–47 (1976); Stone v. Powell, 428 U.S. 465, 486–88 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974). *See also* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUD. 215, 215–18 (1978). The Court's position that the exclusionary rule is merely an evidentiary device blinks at direct language in Mapp v. Ohio, 367 U.S. 643 (1961), to the effect that the rule is of constitutional origin. The *Mapp* Court characterized the exclusionary rule as an "essential part of the right to privacy," *id.* at 656, and an "essential ingredient" of the fourth amendment, *id.* at 657, in holding that "evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court" through the fourteenth amendment. *Id.* at 655. While *Mapp* continues as authority for extending the exclusionary rule to the states, the current Court refuses to acknowledge the *Mapp* rationale for that extension. Accepting, *arguendo*, the Court's contention that the exclusionary rule is non-constitutional in origin and character, it is highly debatable whether the Court has authority to impose the rule on the states. The Court's authority to establish non-constitutional standards within the federal system probably rests in its supervisory power over the lower federal courts, *see, e.g.*, FED. R. CRIM. P. 26, but this would not validate the imposition of such standards on the state courts. Stripped of a constitutional foundation, *Mapp* and its progeny may constitute an extrajurisdictional intrusion upon state judicial autonomy, leaving the Court without legitimate authority to compel state compliance with the exclusionary rule. Yarbrough, *supra* note 25, at 18. *See generally* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

29. 338 U.S. 25 (1949). It appears that Justice Frankfurter, writing for the *Wolf* majority, drew the distinction exclusively to combat the incorporationist argument of Justices Rutledge, Murphy, and Douglas, in dissent, that the exclusionary rule is a constitutional requisite which, like the body of the fourth amendment, is enforceable against the states within fourteenth amendment due process. Justice Frankfurter reasoned that the exclusionary rule, as one of many potential alternatives available to safeguard the fundamental right of security against arbitrary government intrusions, is not inseparably linked with that right. Although Mapp v. Ohio, 367 U.S. 643 (1961), adopted the incorporationist argument of the *Wolf* dissenters, *see* notes 21 & 28 *supra*, the Court has since resurrected the *Wolf* majority's position without overruling *Mapp*. *See* notes 25 & 28 and accompanying text *supra*.

30. *See, e.g.*, United States v. Caceres, 440 U.S. 741 (1979); United States v. Ceccolini, 435 U.S. 268 (1978); United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974); Alderman v. United States, 394 U.S. 165 (1969).

purpose related to but not coextensive with the primary thrust of the fourth amendment, as the paramount rationale underlying the exclusionary rule.[31] The Court operates, then, from a dual premise: (1) the exclusionary rule originates in the Court's discretionary rulemaking authority rather than in the Constitution; and, (2) the rule is designed to regulate government by discouraging police misdeeds.[32] Viewed in this way, the rule is amenable to ongoing reassessment, manipulation, and even abrogation in the Court's judgment. It is a limited remedy for official misconduct,[33] separate from the victim's fourth amendment right.

31. *See, e.g.*, United States v. Janis, 428 U.S. 433, 445–47 (1976); United States v. Calandra, 414 U.S. 338, 347–48 (1974); Comment, *Criminal Procedure: Search and Seizure*, 1977 ANN. SURVEY AM. L. 111. *But see* Stone v. Powell, 428 U.S. 465, 534 (1976) (Brennan, J., dissenting); United States v. Calandra, 414 U.S. 338, 355 (1974) (Brennan, J., dissenting). An additional rationale—preserving judicial integrity—was first articulated by Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 483–85 (1928). Justice Brandeis contended that the probity of the judiciary is irreparably tarnished when the government is permitted to use illegally seized evidence in a court of law. *Id. See also* Elkins v. United States, 364 U.S. 206, 222 (1960). While the judicial integrity rationale is still mentioned by the Court, it receives only nominal consideration. *See, e.g.*, Stone v. Powell, 428 U.S. 464, 485 (1976); United States v. Peltier, 422 U.S. 531, 537–40 (1975).

32. The Court has frequently referred to the exclusionary rule as though it were only a tool of specific deterrence for inhibiting individual police officers and particular episodes of police misconduct. United States v. Janis, 428 U.S. 433, 448 (1976); United States v. Peltier, 422 U.S. 531, 538–39 (1975); Michigan v. Tucker, 417 U.S. 433, 447 (1974) (fifth amendment context). *See also* Brewer v. Williams, 430 U.S. 387, 420–22 (1977) (Burger, C. J., dissenting); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416–18 (1971) (Burger, C. J., dissenting). As Professor Amsterdam notes, many of the empirical studies of the exclusionary rule and its deterrent value also seem to have assumed that the rule is supposed to deter only the particular offending officer. Amsterdam, *supra* note 15, at 476 n.600. *See, e.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 720–57 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973).

In a relatively recent decision, however, the Court, per Justice Powell, stated that the principal deterrent purpose of the exclusionary rule is "over the long term . . . to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." Stone v. Powell, 428 U.S. 465, 492 (1976). Leading commentators also have identified overall law enforcement policy as a primary target of the exclusionary rule. Amsterdam, *supra* note 15, at 431–32; Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1412–13 (1977); Yackle, *supra* note 18, at 426. Some proponents of the exclusionary rule insist that deterrence of lawmaking bodies is within the purview of the rule, given the legislative role in shaping law enforcement policy. *See* United States v. Peltier, 422 U.S. at 557, 558 n.18 (1975) (Brennan, J., dissenting); Stone v. Powell, 507 F.2d 93, 98 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465 (1976).

Despite convincing arguments for an expansive interpretation of the exclusionary rule's deterrent purpose, the Court, in practice, has taken an increasingly narrow view of its scope. *See* notes 29 & 30 and accompanying text *supra*. In particular, an emphasis on highly individualized marginal deterrence variables—such as the good faith of specific police officers—in the exclusionary rule balancing process, casts doubt on the Court's allegiance to *any* general policy-directing role for the sanction. *See* notes 38–48 and accompanying text *infra*. The Court apparently is not committed to its broad statement of exclusionary rule purpose in *Stone v. Powell*.

33. The Court adheres to a deterrence-oriented justification notwithstanding unresolved empirical and philosophical controversy regarding the actual deterrent efficacy of exclusion. In United

The conclusion flows axiomatically that the rule should be applied selectively according to its perceived capability to deter.[34]

To assess the applicability of the exclusionary rule in a given context, the Court balances the anticipated deterrent value against the substantial social cost exacted by suppression of probative evidence.[35] The cost variables are recurrent and for the most part uncontroverted.[36] The marginal deterrence variables are heavily fact-dependent, since any factual condition which could make deterrence more or less likely might conceivably influence the Court's evaluation.[37] For example, Justice Powell, concur-

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States v. Janis, 428 U.S. 433 (1976), the Court evaluated a variety of empirical studies designed to quantify the impact of exclusion on police misconduct and concluded that each study was flawed and that none established "with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." *Id.* at 450 n.22. Studies suggesting that the exclusionary rule fails to effectively deter illegal searches and seizures include Oaks, *supra* note 29; S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE, 50–60 (1977); Spiotto, *supra* note 32. Other more recent studies appear to establish a deterrent effect on at least some types of law enforcement conduct. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels*, 5 AM. POL. Q. 57 (1977); Kamisar, *Does the Exclusionary Rule Affect Police Behavior?*, 62 JUD. 70 (1978). The best that can probably be said of the total data compiled to date is that they are inconclusive. *Accord*, W. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 26 (1978).

34. Justice Rehnquist reiterated in United States v. Peltier, 422 U.S. 531 (1975), that the exclusionary rule is a "judicially created *remedy* . . . rather than a personal constitutional *right*" and therefore selectively applicable according to its remedial function. *Id.* at 538–39 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)) (emphasis added).

35. United States v. Janis, 428 U.S. 433, 448–54 (1976); Stone v. Powell, 428 U.S. 465, 486–89 (1976); United States v. Calandra, 414 U.S. 338, 348–52 (1974). *See* Yarbrough, *supra* note 25, at 19. Although the balancing formula was finally established as the definitive test for applicability of the exclusionary rule in the *Calandra-Janis-Stone* trilogy, its conceptual genesis can be traced to earlier decisions. *See* Comment, *Fourth Amendment in the Balance—The Exclusionary Rule after* Stone v. Powell, 28 BAYLOR L. REV. 611 (1976); Irons, *The Burger Court: Discord in Search and Seizure*, 8 U. RICH. L. REV. 433 (1974).

36. In Stone v. Powell, 428 U.S. 465 (1976), the Court summarized the main costs of applying the exclusionary rule. First, it diverts the attention of the litigants and other participants from the central question of guilt or innocence to collateral issues. *Id.* at 489–90. Second, it denies the trier of fact access to reliable, probative, and usually critical evidence. *Id.* at 490. The truthfinding process is thus inhibited with the result that the guilty are sometimes permitted to go free. *Id.* Finally, the indiscriminate application of the rule may generate disrespect for the law because of its harsh effect. *Id.* at 490–91. Each of these cost elements is a by-product of the overriding interest in promoting effective law enforcement by facilitating the ascertainment of truth. *See, e.g.*, Irvine v. California, 347 U.S. 128, 136 (1954); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926); 8 WIGMORE ON EVIDENCE § 2184a, at 51–52 (McNaughton ed. 1961); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

37. It has been suggested that the practical effect of the Burger Court's balancing approach has been a retrenchment to the due process "shocking-the-conscience" standard developed almost three decades ago in Rochin v. California, 342 U.S. 165 (1952) and Irvine v. California, 347 U.S. 128 (1954). Yackle, *supra* note 118, at 427–37. A fact-oriented, essentially case-by-case balancing formula does resemble the *Rochin-Irvine* due process approach, particularly when the balancing is

ring in *Brown v. Illinois*,[38] contended that good faith arrests made in reliance on subsequently invalidated warrants or statutes are " 'technical' Fourth Amendment violations"[39] which are effectively nondeterrable and thus do not merit application of the exclusionary rule.[40] While the Court has not formally acknowledged this as a broad proposition, it has affirmed, in a variety of contexts, Justice Powell's assertion that police good faith is a key variable in the balancing process.[41]

C. *The Role of Police Officer Good Faith*

The doctrinal severing of right and remedy in fourth amendment cases has led to disparate treatment of police officer good faith in exclusionary rule analysis and in substantive analysis.

1. *Good Faith and the Exclusionary Rule*

The Court includes police officer good faith in its exclusionary rule balancing test on the theory that deterrence is less likely in cases of non-egregious police behavior. Yet the Court has thus far declined to carry the argument to its logical extreme and declare that the exclusionary rule is ineffective and hence unavailable whenever the police have acted reasonably and in good faith.[42]

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heavily influenced by the flagrancy, egregiousness, and wilfulness of alleged police misconduct. *See* note 40 and accompanying text *infra*.

38. 422 U.S. 590 (1975).

39. *Id.* at 610.

40. Justice Powell cited examples of deterrence-related variables in an arrest setting: the existence or non-existence of probable cause to arrest; the collateral (pretextual) motives of the arresting officer; the physical circumstances under which the arrest was made; the good faith or wilfulness of the officer responsible for an alleged violation. *Id.* at 611. Justice Powell's formulation resembles in many respects the so-called "substantiality" test for application of the exclusionary rule devised by the American Law Institute (A.L.I.). MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2(2)–.2(4) (1975). Prominent in both is the state of mind of law enforcement officers involved in the challenged conduct. For a thorough explanation of the A.L.I. substantiality test by one of its supporters, see Coe, *supra* note 22. Other sources have urged the adoption of a flexible approach approximating the A.L.I. standard. *See, e.g.*, Sunderland, *supra* note 25, at 154–59; Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 419, 424–26 (1971)(opinion and appendix of Burger, C.J., dissenting). *But see* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 686–88 (1975).

41. United States v. Ceccolini, 435 U.S. 268, 279–80 (1978); Scott v. United States, 436 U.S. 128, 135–37 (1978); United States v. Janis, 428 U.S. 433, 454 n.28 (1976); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433, 447 (1974).

42. Of course, if one accepts the proposition that the exclusionary rule should be applied with an eye toward discouraging law enforcement policies and legislation mandating unconstitutional conduct, *see* note 28, *supra*, then the argument for an exception to the exclusionary rule based upon the good faith of individual police officers loses much of its force. *See* MODEL CODE OF PRE-ARRAIGNMENT

United States v. Peltier[43] stimulated speculation that the Court was prepared to ratify a general good faith exception to the exclusionary rule.[44] Justice Rehnquist, writing for a five member majority, stated, in dictum, that if deterrence is the rationale underlying exclusion, then evidence obtained in a search should be suppressed only when the officer knew, or could properly be charged with knowing, that his conduct violated the fourth amendment.[45] Thus, at least five of the Justices[46] have arguably been poised since *Peltier* to adopt explicitly a good faith exception to the exclusionary rule.[47] For the time being, however, good faith reliance remains nothing more than a heavily weighted variable in the overall balancing formula.[48]

PROCEDURE § 290.2(3) (1975) (rendering a fourth amendment violation wilful, and thus substantial *per se*, regardless of the officer's actual good faith, if his behavior appears to have been part of the practice of a law enforcement agency or was authorized by it).

43. 422 U.S. 531 (1975). *Peltier*, involving the question whether Almeida-Sanchez v. United States, 413 U.S. 266 (1974) should be accorded retroactive application, was decided on the basis of precedent governing the retroactive application of constitutional holdings. Justice Rehnquist, however, devoted the bulk of his majority opinion to developing the argument that the deterrent purposes of the exclusionary rule are not served in cases where the officers involved relied in good faith on a statute or other external authorization. *Id.* at 536–42.

44. Justice Brennan, dissenting vigorously in *Peltier*, predicted that given a "suitable opportunity," the Court would adopt a broad good faith exception to the exclusionary rule. *Id.* at 552. Virtually every commentator addressing the question in the wake of *Peltier* reached the same conclusion. *See, e.g.*, Gilday, *The Exclusionary Rule: Down and Almost Out*, 4 N. KY. L. REV. 1, 7–12 (1977); Grano, *1976 Annual Survey of Michigan Law—Criminal Procedure*, 23 WAYNE L. REV. 517, 547 (1977); Comment, *Impending "Frontal Assault" on the Citadel: The Supreme Court's Readiness to Modify the Strict Exclusionary Rule of the Fourth Amendment to a Good Faith Standard*, 12 TULSA L. J. 337, 352–56 (1976). The discussion has been roughly divided between proponents and opponents of a good faith exception. *Compare* Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective*, 10 PAC. L.J. 33, 51–53 (1978) (irreparable shortcoming of a good faith limitation is that it places a premium on police officer ignorance of constitutional guidelines) and Kaplan, *supra* note 28, at 1044 (1974)(same), *with* Israel, *supra* note 32, at 1408–15 (reasonable good faith exception does not imperil the primary deterrent purpose of the exclusionary rule) and Grano, *supra*, at 551 (when motive is innocent, deterrence is not served).

45. United States v. Peltier, 422 U.S. 531, 542 (1975).

46. Chief Justice Burger and Justices Blackmun, Powell, White, and Rehnquist.

47. The remaining members of the *Peltier* majority (the Chief Justice and Justices Blackmun, Powell, and White) have indicated their support for such an exception in several more recent cases. *See* Rakas v. Illinois, 439 U.S. 128, 156 n.5 (1979) (Powell, J., concurring); Brewer v. Williams, 430 U.S. 387, 413–14 n.2 (1977) (Powell, J., concurring); Stone v. Powell, 428 U.S. 465, 501–02, 537–42 (1976) (Burger, C.J., concurring and White, J., dissenting); United States v. Janis, 428 U.S. 433, 457–58 n.35 (1976).

48. One explanation for the Court's failure to endorse officially a good faith exception despite majority support is that possibly those Justices who agree in principle that *some* form of good faith limitation is needed disagree on what the specific nature of that exception should be. On the issue whether an objective or a subjective good faith standard is contemplated by the different Justices, see Comment, 28 BAYLOR L. REV. 611, *supra* note 35, at 626–28. An alternative explanation may be the difficulty of squaring a good faith exception with the long line of Supreme Court cases invoking the exclusionary rule despite undisputed good faith reliance by law enforcement personnel. *See* notes 58–60 and accompanying text *infra*.

2. *Good Faith and Substantive Doctrine*

In *Peltier* Justice Rehnquist implied that good faith reliance is relevant to the suppression issue because of the deterrence purpose that distinguishes the exclusionary remedy from the underlying fourth amendment right.[49] Prior to *DeFillippo,* the Court generally treated police good faith as an exclusively remedial influence. Good faith was a prominent factor in deciding whether to apply the exclusionary rule remedy but it played no discernible role in substantive analysis.

The Court has found fourth amendment violations, in spite of undisputed police good faith, where officers acted in reliance on warrants[50] or statutes[51] that failed to satisfy constitutional requirements. According to the Court, the issue in such cases is whether the challenged conduct can nevertheless be justified under the fourth amendment.[52] Addressing that issue, the Court has uniformly disregarded police good faith reliance.[53] The constitutional predicate for a valid arrest or search is objective[54] probable cause,[55] and the responsibility for verifying its existence rests

49. 422 U.S. 531, 538–39 (1975). *See* notes 34 & 40 and accompanying text *supra.*

50. *See, e.g.,* Whiteley v. Warden, 401 U.S. 560 (1971) (facially valid arrest warrant later found fatally deficient); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (search warrant found deficient); Berger v. New York, 388 U.S. 41 (1967) (wiretap order found deficient); Aguilar v. Texas, 378 U.S. 108 (1964) (search warrant); Giordenello v. United States, 357 U.S. 480 (1958) (arrest warrant).

51. Torres v. Puerto Rico, 442 U.S. 465 (1979) (statute authorizing search of all luggage entering Puerto Rico from the United States); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (statute and supplementing regulations authorizing roving border patrol searches of all automobiles in the vicinity of the national border); Sibron v. New York, 392 U.S. 40 (1968) (state stop-and-frisk law).

52. *See, e.g.,* Whiteley v. Warden, 401 U.S. 560, 567–69 (1971); Sibron v. New York, 392 U.S. 40, 61 (1968).

53. When the issue is the impact on probable cause of a "factual" error, such as a misidentification, however, the Court does not hesitate to consider the policeman's good faith. *See, e.g.,* Hill v. California, 401 U.S. 797 (1971). In *Hill,* the police mistakenly arrested the wrong party, reasonably believing him to be the actual suspect for whose arrest probable cause existed. The Court upheld the validity of the arrest. The rule which emerges is that a reasonable, good faith mistake of fact will not, in and of itself, vitiate probable cause to arrest or to search.

54. "[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

55. Probable cause to arrest means "facts and circumstances within the officer's knowledge . . . sufficient to warrant a prudent person, or one of reasonable caution, in believing . . . that the suspect has committed, is committing, or is about to commit an offense." Michigan v. DeFillippo, 443 U.S. 31, 37 (1979). Of course, some searches and seizures, because they are less intrusive than an arrest or a fullblown search, do not require the traditional level of probable cause. *See, e.g.,* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (roving border patrol stop of motorists in the general area of the border for a brief inquiry into their residence status); Terry v. Ohio, 392 U.S. 1, 26 (1968) (stop and frisk); Camara v. Municipal Court, 387 U.S. 523, 538 (1967) (administrative inspection).

with the judiciary.[56] These cases demonstrate the Court's past unwillingness to allow a policeman's good faith reliance on external authorization to substitute for probable cause or to compensate for inadequacies in the probable cause standard. Thus, in discharging its duty to scrutinize the constitutional validity of police behavior, the Court has treated police officer good faith as irrelevant.[57]

Several of the cases, like *DeFillippo,* involved police actions conducted without a warrant but pursuant to a specific statutory directive.[58] The Court has unequivocally adopted *objective* reasonableness of police *conduct,* in all the circumstances, as the standard for its substantive fourth amendment analysis in such cases.[59] Under this standard, a warrantless search or arrest considered in "the concrete factual context of the individual case,"[60] is measured directly against the requirements of the fourth amendment. The question becomes whether the challenged conduct, standing alone, is "reasonable" within the meaning of that amendment. Neither the existence of statutory authorization nor the conceded good faith reliance of the officers involved has had any bearing on the Court's analysis. *DeFillippo* seemed to be clearly within the group of cases to which this standard of substantive review has consistently been applied.

The foregoing discussion illustrates that while police officer good faith has been a key ingredient of the Court's exclusionary rule balancing analysis,[61] it has not entered into the analysis of alleged fourth amendment violations. Until *DeFillippo,* the Court regarded good faith reliance by policemen as immaterial in deciding whether an individual's fourth amendment rights were abridged.

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56. *See, e.g.,* Gerstein v. Pugh, 420 U.S. 103, 112–14 (1975). Chief Justice Warren, writing in Terry v. Ohio, 392 U.S. 1 (1968), noted:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Id. at 21.

57. The Court has long maintained that the judicial evaluation of probable cause must be based on external, objective scrutiny: "good faith on the part of the arresting officers is not enough." Henry v. United States, 361 U.S. 98, 102 (1959), *Accord* Beck v. Ohio, 379 U.S. 80, 97 (1964); Brinegar v. United States, 338 U.S. 160, 175 (1949); Director General v. Kastenbaum, 263 U.S. 25, 27–28 (1923).

58. *See* cases cited in note 51 *supra.*

59. This, according to the Court, is the appropriate method by which the constitutional reasonableness of all warrantless searches and seizures must be tested. Sibron v. New York, 392 U.S. 40, 59, 61 (1968).

60. *Id.* at 59.

61. *See* notes 39–48 and accompaying text *supra.*

II. THE COURT'S REASONING

Chief Justice Burger framed the issue in *DeFillippo* as "whether an arrest made in good-faith reliance on an ordinance . . . is valid regardless of a subsequent judicial determination of its unconstitutionality."[62] He stated initially that both the arrest and search were valid if the police had probable cause to believe that DeFillippo had committed a criminal offense.[63] The Chief Justice then found that, at the time of the arrest, the officer possessed "abundant probable cause to believe that respondent's conduct [ambiguously responding to the officer's request for identification[64]] violated the terms of the ordinance."[65] This triggered Michigan's General Arrest Statute, authorizing the officer to arrest DeFillippo.[66] Therefore the warrantless arrest and the search conducted incident to it[67] were upheld and the suppression order was reversed.

According to the Chief Justice, the subsequent invalidation of the ordinance neither impaired probable cause nor in any way affected the legality of the arrest. Since at the time there was "no controlling precedent that this ordinance was or was not constitutional,"[68] the officer relied in good faith on a "presumptively valid"[69] law and could not be charged with knowledge of its latent unconstitutionality.[70] To support this contention the Chief Justice analogized to *Pierson v. Ray*,[71] in which the Court held that a police officer who relied in good faith on a presumptively valid law could not be found civilly liable for damages resulting from a deprivation of fourth amendment rights.[72]

62. 443 U.S. at 33.

63. *Id.* at 35–36.

64. *See* note 2 *supra*.

65. 443 U.S. at 36.

66. *See* note 3 *supra*. The Supreme Court held in United States v. Watson, 423 U.S. 411 (1976), that an arrest in a public place without a warrant is valid if it is based on probable cause.

67. A valid custodial arrest, standing alone, entitles the police to conduct a full body search of the arrestee. Independent probable cause to search is not required. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). *See also* Comment, *Reexamination of the Search Incident to Arrest Doctrine*, 56 TEX. L. REV. 1077 (1978); Comment, *Searches Incident to Arrest: The Expanding Exception to the Warrant Requirement*, 63 GEO. L.J. 223 (1974).

68. 443 U.S. at 37.

69. *Id.*

70. *Id.* at 37–38. Under that line of reasoning, the ordinance's illegality could not, as a matter of law, be a "fact or circumstance" within the officer's knowledge in the absence of subjective bad faith. Alternatively, a law's "presumptive validity" is always a "fact or circumstance" imputed to the officer's knowledge. *See* section IV *infra*.

71. 386 U.S. 547 (1967). *Pierson* was brought under 42 U.S.C. § 1983 (1976).

72. 443 U.S. at 38. Chief Justice Burger did not distinguish between the civil and the criminal setting in his analogy to *Pierson*. Dissenting, Justice Brennan flatly disputed the majority's focus on the good faith of arresting officers and in particular challenged its reliance on *Pierson* as being misplaced. *Id.* at 42 & n.1. Justice Brennan argued that the civil suit, in which an *officer* is on trial and is

Finally, Chief Justice Burger distinguished a group of cases in which the Court struck down good faith searches conducted pursuant to presumptively valid statutes that "purported to authorize the searches in question without probable cause and without a valid warrant."[73] Those statutes, he explained, directly sanctioned searches in violation of the fourth amendment.[74] Detroit's ordinance, by contrast, merely defined a substantive offense[75] and did not empower the police to do anything. Thus, said the Chief Justice, the only constitutional issue presented in *DeFillippo* was whether the officer had probable cause to believe the ordinance had been violated.[76]

III. ANALYSIS AND CRITICISM

A. *The Court's Choice of Method: Constricting the Right v. Withholding the Remedy*

From DeFillippo's point of view it made little practical difference whether the Court held, as it did, that no fourth amendment violation occurred or simply that the exclusionary rule was inapplicable. In either case, the incriminating evidence obtained in the search incident to his arrest would not be suppressed. Although on that narrow level the alternative grounds for admitting the evidence are interchangeable, the Court's choice between them has substantial long-range implications. Limiting the exclusionary rule may emasculate the right purportedly being protected,[77] but leaves the constitutional substructure undisturbed. A *DeFillippo*-type decision, on the other hand, erodes the underlying substance upon which any remedy may operate.

As a general postulate, a remedy-restrictive result is preferable to a right-destructive result. Two conditions enhance that preference in cases such as *DeFillippo*. First, since the outcome is identical under either alternative, the desired result—admissibility of reliable evidence—need not be achieved at the expense of fourth amendment content. Second, the

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exposed to liability, provides a justification for the good faith defense which is absent in the criminal proceeding, where the *suspect* is on trial and the police officer is not subject to liability. *Id.* at 42 n.1. *See* section III–*C infra*.

73. 443 U.S. at 39. *See* the cases cited in note 51 *supra*, and *see* notes 58–60 and accompanying text *supra*.

74. "Those decisions involved statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable cause requirements of the Fourth Amendment." 443 U.S. at 39.

75. *Id.*

76. *Id.* at 40.

77. Burkoff, *supra* note 15. *See also* notes 31–33 and accompanying text *supra*.

flexible fourth amendment remedy doctrine permits withholding the exclusionary rule in those instances where its deterrence purposes will not be served,[78] a result made possible by the Court's careful refusal to treat the remedy as coextensive with the underlying right.[79] It would have been doctrinally consistent for the *DeFillippo* Court to reserve good faith—a major variable in the deterrence-based exclusionary rule balancing process[80]—for consideration in that context. The Court, however, read good faith reliance into the substantive analysis and used it to deny that DeFillippo's fourth amendment rights had been violated.

Nevertheless, exclusionary rule policies influenced the decision. Chief Justice Burger explicitly mentioned the deterrence rationale of the rule,[81] noting that "no conceivable purpose of deterrence"[82] could be served by suppression. That reasoning was premature. Deterrence, as a remedial objective, has no bearing on the existence or non-existence of a fourth amendment violation. The reference to deterrence in the substantive context indicates a blurring of the doctrinal right-remedy distinction. This is disturbing because it may expose fourth amendment content to the pressures responsible for steady diminution of the exclusionary rule,[83] allowing Burger Court hostility toward exclusion[84] to taint substantive search and seizure doctrine.

B. The Incorporation of Good Faith Reliance

The Court's approach also marked a departure from the established standard for review of warrantless police actions.[85] That standard focuses

78. *See* notes 25–34 and accompanying text *supra*.

79. *See* notes 16–34 and accompanying text *supra*.

80. *See* note 41 and accompanying text, and section I–*C–1 supra*.

81. 443 U.S. at 38 n.3.

82. *Id.*

83. *But see* Burkoff, *supra* note 15, at 181–88 (taking the position that for the sake of doctrinal consistency the Court should consolidate its treatment of right and remedy in fourth amendment cases).

84. The numerous limitations imposed on the exclusionary rule under the marginal deterrence rationale, *see, e.g.*, United States v. Janis, 428 U.S. 433 (1976), have been widely interpreted as reflecting the Burger Court's antagonism toward a rule which mandates the suppression of reliable evidence. Kaplan, *supra* note 28, at 1040; Yarbrough, *supra* note 25, at 18; Comment, *Reason and the Fourth Amendment—The Burger Court and the Exclusionary Rule*, 46 FORDHAM L. REV. 139, 152–58, 166 (1977). Chief Justice Burger has expressed open animosity, referring to the rule as a "Draconian judicial doctrine," Brewer v. Williams, 430 U.S. 387, 420 (1977)(Burger, C. J., dissenting), which is "conceptually sterile and practically ineffective." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971)(Burger, C.J., dissenting). *See also* Coolidge v. New Hampshire, 403 U.S. 433, 492–93 (1971)(Burger, C.J., dissenting); Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 12 (1964).

85. *See* notes 58–60 and accompanying text *supra*.

on the objective reasonableness of the challenged *conduct* in all the circumstances, irrespective of any external authorization for the conduct.[86] The facial validity of the Detroit ordinance, assumed by the Michigan Court of Appeals to be dispositive,[87] was not the proper issue under prevailing Supreme Court doctrine.[88] Chief Justice Burger appropriately disregarded that question.[89] He erred, however, by looking to the officer's good faith as a benchmark for the reasonableness of the decision to arrest

86. Sibron v. New York, 392 U.S. 40, 59 (1968).

87. People v. DeFillippo, 80 Mich. App. 197, 262 N.W.2d 921 (1977). The Michigan Court adopted the majority view among the lower courts that an arrest made under a law unconstitutionally vague on its face is invalid regardless of good faith reliance by executing officers. *See* Newsome v. Malcolm 492 F.2d 1166 (2d Cir. 1974); Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465 (1976); Hall v. United States, 459 F.2d 831 (D.C. Cir. 1972)(en banc); People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied sub nom.* New York v. Berck, 414 U.S. 1093 (1973). Only the Fifth Circuit adhered to the position that the constitutionality of a substantive law is irrelevant in assessing the validity of an arrest for its violation. *See* United States v. Carden, 529 F.2d 443 (5th Cir. 1976).

88. In Sibron v. New York, 392 U.S. 40 (1968), the Court stated that "[t]he question . . . upon review of a state-approved search or seizure 'is not whether the search (or seizure) was authorized by state law . . . [but] whether the search [or seizure] was reasonable under the Fourth Amendment.' " *Id.* at 61 (quoting Cooper v. California, 386 U.S. 58, 61 (1967)). The parties in *Sibron* had urged that the main issue was the constitutionality of a state "stop-and-frisk" law. 392 U.S. at 59. The Court, however, by-passed that question on the theory that the constitutionality of warrantless police conduct can be judged only in the factual context of the specific case. *Id.* at 59–62. Later decisions have not deviated from the *Sibron* rule that the facial validity of an underlying law is not the appropriate issue. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973). While the Court implied in Papachristou v. City of Jacksonville, 405 U.S. 156, 168–71 (1972), that any government action taken under an unconstitutional law is invalid, that implication has never materialized in fourth amendment cases. *See* note 89 *infra*.

Although the *Sibron* standard calls for an independent review of warrantless police conduct, its application can have the indirect effect of invalidating an underlying statute or ordinance. If the challenged conduct conforms strictly to the terms of an authorizing provision, then finding the conduct unconstitutional is tantamount to striking down the provision. *See, e.g.*, Torres v. Puerto Rico, 442 U.S. 465 (1979); Ybarra v. Illinois, 444 U.S. 85 (1979); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

89. 443 U.S. at 37, 40. Justice Brennan argued in dissent that it was incumbent upon the Court to evaluate the constitutionality of the ordinance. *Id.* at 43–46. The Court's rejection of that argument negated an implication in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), that arrests as well as convictions under an unconstitutionally vague law are *per se* invalid. The *Papachristou* Court, per Justice Douglas, ruled that an overbroad vagrancy ordinance is unconstitutional, in part, because it denigrates the fourth amendment probable cause standard by permitting pretextual vagrancy arrests of persons suspected of other criminal involvement. *Id.* at 168–70. Although *Papachristou* dealt with the validity of a vagrancy *conviction*, the tenor of the opinion suggested that *all* official actions under the void law were patently invalid because accomplished without legitimate authority. The *Papachristou* rationale was relied upon by the Michigan Court of Appeals. People v. DeFillippo, 80 Mich. App. 197, 262 N.W.2d 921 (1977). *See also* Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465 (1976); Hall v. United States, 459 F.2d 831 (D.C. Cir. 1972)(en banc). After *DeFillippo*, it is clear that a substantive law's constitutionality is not a precondition to the validity of arrests for its violation.

and search DeFillippo. The result was a failure to engage in the independent evaluation of warrantless conduct mandated by earlier cases.

The *DeFillippo* majority acknowledged without discussion the officer's actual good faith,[90] and concluded that since the ordinance was presumptively valid[91] his reliance on it was reasonable as a matter of law. The inquiry was thus reduced to a rote comparison of its terms (as the measure of probable cause) with the "facts and circumstances" surrounding the arrest.[92] That led to validation of the arrest and search because DeFillippo's false identification "violated the plain language of the Detroit ordinance."[93] The Court accepted good faith compliance with the ordinance as a substitute for external judicial evaluation of the officer's action. Effectively, the Court deferred to the policeman's and the Detroit Common Council's[94] assessment of what constitutes lawful conduct under the fourth amendment.

Had good faith reliance been reserved for the remedy stage of the analysis, the Court could not have avoided troublesome constitutional issues by hiding behind the terms of the city ordinance. Under the traditional standard for review of warrantless conduct, the Court should have determined, without reference to the ordinance, whether it was reasonable for the officer to arrest DeFillippo when and because he failed to identify himself.[95] If the arrest could not have been made in conformity with

90. The Court did not reveal how it ascertained that the officer had in fact acted in good faith. A criticism of the good faith standard is the added factual burden it imposes on trial courts in fourth amendment cases. *See* United States v. Peltier, 422 U.S. 531, 560–61 (1975)(Brennan, J., dissenting); *The Supreme Court, 1978 Term,* 93 HARV. L. REV. 181, 186 (1979). The good faith inquiry necessitates probing the mind of the officer involved. Moreover, an officer's assertion of subjective good faith is virtually impossible for the defendant to refute. Amsterdam, *supra* note 15, at 436–37; Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule,* 69 J. CRIM. L. & CRIMINOLOGY 635, 655–56 (1978); Thies, *"Good Faith" as a Defense to Police Deprivations of Individual Rights,* 59 MINN. L. REV. 991 (1975). The difficulty of disproving a good faith claim under these circumstances effectively creates a presumption which redounds to the benefit of the government in suppression hearings.

91. In *DeFillippo,* the finding of presumptive validity was based entirely on the non-existence of "controlling precedent" at the time the arrest occurred. 443 U.S. at 37. The Court stated that in such cases any law is presumptively valid and may be relied upon by the police, "with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 38. The message is manifest: the police may claim reliance upon the validity of any law except in those extraordinarily rare instances where a clear-cut and binding judicial pronouncement to the contrary has already been made.

92. *Id.* at 36–37.

93. *Id.* at 37.

94. The Detroit Common Council is the lawmaking body responsible for the city ordinance. Brief for the Respondent at 4–5, Michigan v. DeFillippo, 443 U.S. 31 (1979).

95. This would have required consideration of at least two issues: (1) whether a suspect stopped by police on suspicion not amounting to probable cause can be compelled to answer questions during field interrogation; (2) if so, whether his refusal to answer can independently generate probable cause to arrest when it had not existed prior to the refusal. These issues were important to the dissenters.

fourth amendment requirements, then a violation of constitutional rights occurred regardless of the officer's good faith reliance on an existing law. Of course, a good faith showing might still have prevented suppression by blocking application of the exclusionary rule. Nothing precluded a finding that the arrest was unconstitutional from the suspect's point of view but valid from the officer's perspective for purposes of resolving the exclusion issue.

C. *The Substantive-Procedural Dichotomy*

The Court drew a distinction between substantive laws—like the Detroit ordinance—which define criminal offenses, and procedural laws which independently authorize searches and seizures.[96] An arrest or search carried out pursuant to a procedural law which purports to authorize the conduct without probable cause and without a warrant will be struck down.[97] An arrest and search conducted under a substantive law will be upheld if the officer had probable cause and relied in good faith on the law, even if it is later determined to be unconstitutional.[98] This distinction is flawed for two reasons.

First, it disregards the inherent procedural dimension of substantive laws. No criminal statute is operational without an implementing provision. For example, in *DeFillippo,* the Michigan General Arrest Statute[99] was the procedural arm of the Detroit city ordinance. Technically, the two laws served distinct purposes. Realistically and functionally, however, they operated as a unit. In addition, the *DeFillippo* ordinance was not a purely substantive law, because it internally and independently authorized the officer to stop and question the defendant.[100] Thus, the initial intrusion, which led to the subsequent arrest and search, was a direct product of the ordinance alone. As a general principle, as well as on the specific law involved, the Court's substantive-procedural distinction is baseless.

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443 U.S. at 44–46. Justice Brennan asserted that the criminal suspect has a clearly defined right to remain silent in the face of post-stop questioning by police. Aside from dictum in Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969), and Justice White's concurring remarks in Terry v. Ohio, 392 U.S. 1, 34 (1968), both of which take the Brennan position, neither the Court nor any of its members has addressed the question.

96. 443 U.S. at 39–40. *See* notes 73–76 and accompanying text *supra*. The Court has reaffirmed the distinction in Ybarra v. Illinois, 444 U.S. 85, 96 n.11 (1979).

97. 443 U.S. at 39–40.

98. *Id.*

99. MICH. COMP. LAWS ANN. § 764.15 (1970).

100. *See* note 4 and accompanying text *supra*. The street stop was classified as a "seizure" within the meaning of the fourth amendment in Terry v. Ohio, 392 U.S. 1 (1968).

Second, the distinction invites cynical legislatures to circumvent fourth amendment limitations through the use of superficial substantive offenses.[101] Rather than directly authorize the arrest or search of suspicious characters—a violation of the fourth amendment—lawmakers will be encouraged after *DeFillippo* to adopt statutes making it a crime for such individuals not to identify themselves or respond to police questioning.[102] Arrests under these statutes would routinely be followed by pat-downs or full searches. The Court's artificial line-drawing thus allows an end run around the fourth amendment.[103] Justice Blackmun suggested, in his concurring opinion, that abuses could be avoided by permitting a defendant to rebut claimed good faith reliance by showing that the police habitually use the substantive statute as a pretext for conducting otherwise unauthorized searches and seizures.[104] That possibility is unrealistic because it provides no workable standard to guide the trial courts and because proving the habitually pretextual application of a statute would be virtually impossible given the general unavailability of reliable criminal justice statistics.[105]

D. The Analogy to Pierson v. Ray

The majority sought to bolster its position by relying on the reasoning of *Pierson v. Ray*.[106] *Pierson* and *DeFillippo*, however, share nothing beyond some factual similarity.[107] In the civil setting an officer's pecuniary liability is at issue. The appropriateness of an inquiry into the blameworthiness of his conduct before requiring him to respond in damages is

101. Justice Brennan argued that the Detroit Common Council was guilty of just such an act of "legislative legerdemain" in its passage of the ordinance. 443 U.S. at 45. He concluded that the ordinance was designed to permit the arrest and search of suspicious persons and to avoid constitutional limits on a policeman's authority to compel such persons to answer questions by the "transparent expedient" of making their refusal to answer a crime. *Id.*

102. The Detroit ordinance was amended (to make a suspect's refusal to identify himself a crime) in response to a wave of street crime by juveniles "who consistently refuse to cooperate with the police in conducting their investigations." Preamble to Ordinance to Amend Chapter 39, Article I of the Code of the City of Detroit, *reprinted in* Brief for the Respondent at 5 n.7. The amendment was part of an "all out 'war' " against juveniles involved in such crime. *Id.*

103. Judge Browning, writing for a unanimous three judge panel in Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465 (1976), described the vagrancy ordinance under which the defendant had been arrested in that case as one which "though in form . . . purports to create a substantive offense, in effect . . . negates the requirement of probable cause, basic to the Fourth Amendment." *Id.* at 98. The court invalidated the arrest.

104. 443 U.S. at 40–41 (Blackmun, J., concurring).

105. *See* INSTITUTE FOR LAW AND SOCIAL RESEARCH, HIGHLIGHTS OF INTERIM FINDINGS AND IMPLICATIONS 8 (1977); *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 181, 186 (1979).

106. 386 U.S. 547 (1967).

107. *Pierson* also involved an arrest allegedly made in good faith reliance on a law later held unconstitutional. *Id.*

obvious. To penalize the officer who acts reasonably in the good faith belief that his behavior accords with a valid law would be unfair and intimidating. The civil analogy is simply inapposite in the criminal context[108] where the defendant's motion to suppress evidence involves no contest between the officer and the defendant and the officer is not exposed to liability.

Moreover, in *Pierson* the Court only limited the civil remedy for constitutional deprivations by recognizing a policeman's defense of good faith reliance.[109] It was a remedy-restrictive rather than a right-destructive holding and had nothing to do with the basic constitutionality of police conduct. Thus, the *DeFillippo* Court's indiscriminate analogy to *Pierson* as a makeweight for the finding that no fourth amendment violation took place further obscures the right-remedy distinction.

IV. THE IMPLICATIONS OF *DEFILLIPPO*

DeFillippo signals the Court's increasing readiness to inquire into the good faith of arresting or searching officers whenever a defendant seeks to establish a fourth amendment violation.[110] The decision affords attentive legislatures an excellent opportunity to take advantage of the shift in doctrine. Recently, the Court declined to apply *DeFillippo* in a case involving an unconstitutional "procedural" law,[111] implicitly reaffirming its substantive-procedural dichotomy and reinforcing the message that "substantive" offenses may be used with impunity as a subterfuge for circumventing constitutional limits.[112] Aside from creating this potential for abuse, the *DeFillippo* decision seriously undermines the objective

108. *See DeFillippo*, 443 U.S. at 42 n.1 (1979) (Brennan, J., dissenting). *See also* Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978); Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974). These circuit court cases held that the defense of good faith is unavailable in civil suits for injunctive relief or declaratory judgment, since it is merely a shield to protect the public official from having to respond in damages. They fortify the argument that the *Pierson* rationale has no place in criminal suppression hearings because in that conext the officer has no need of a "shield" to defend himself against a damages claim. *But see* Stone v. Powell, 428 U.S. 465, 541–42 (1976)(White, J., dissenting)("If the defendant in criminal cases may not recover [damages] for a mistaken but good-faith invasion of his privacy, it makes even less sense to exclude the evidence solely on his behalf."); United States v. Dameron, 460 F.2d 294, 295 (5th Cir. 1972); People v. Gibbs, 16 Cal. App. 3d 761, 763, 94 Cal. Rptr. 458, 461 (1971); Weber, *Good Faith of Peace Officers in Search and Seizure: Seeking Proper Limits to the Exclusionary Rule*, 53 L. A. BAR J. 307, 309–15 (1977).

109. 386 U.S. 547, 557 (1967).

110. *See* section III-*B supra*.

111. Ybarra v. Illinois, 444 U.S. 85, 96 n.11 (1979). The statute in question was ILL. REV. STAT. ch.38, § 108–09 (1975), which provided that the officer executing a search warrant may detain and search anyone on the premises.

112. *See* notes 101–105 and accompanying text *supra*.

standard for judicial review of police-citizen confrontations so important to the protection of individual privacy rights.

The measure of good faith reliance in *DeFillippo* purportedly included both the officer's subjective belief that he was acting lawfully and the objective reasonableness of that belief.[113] Since virtually every law is presumptively valid,[114] however, it will be difficult for any court to rule, as a matter of law, that a police officer's reliance on existing statutory provisions was unreasonable. As a practical matter, then, objective reasonableness is a fictional requirement; the determination of good faith reliance under *DeFillippo* hinges on an officer's asserted honesty in fact.[115] Given the difficulty of rebutting such claims,[116] the test really boils down to whether the prosecution can point to a substantive statute or ordinance that the officer was allegedly enforcing at the time of the challenged conduct. If that showing is made, the terms of the law itself serve as the measure of probable cause. Thus, the effectively subjective good faith reliance claim becomes the key to the entire analysis, supplanting independent judicial scrutiny of police conduct.

On its facts, *DeFillippo* is limited to situations in which the police officer's claim of good faith reliance is linked to an objectively verifiable standard (such as the Detroit ordinance). But the case could prompt courts to apply a good faith test whenever the adequacy of probable cause to arrest or to search is an issue. In particular, the majority's ill-advised analogy to *Pierson v. Ray* may invite the lower courts to incorporate gen-

113. The objective reasonableness prong of the good faith standard was subsumed within the finding of presumptive validity. 443 U.S. at 37–38. *See* note 91 and accompanying text *supra*.

114. Very few statutes fall outside the Court's encompassing definition of "presumptive validity." *See* note 91 *supra*.

115. This is precisely the subjective inquiry thought to have been foreclosed in substantive fourth amendment analysis only a year earlier by Scott v. United States, 436 U.S. 128 (1978). In *Scott*, Justice Rehnquist stated flatly that an officer's improper motive, while relevant to the exclusion issue, is not a consideration in establishing the existence or non-existence of a fourth amendment violation. *Id.* at 135–37. His rationale, consistent with the *Sibron* standard, was that the Court's analysis should be "based on the reasonableness of the actual [conduct]," *id.* at 134, 135–38, since an objectively reasonable basis for bad faith conduct might still be found. *Id.* at 138. Applying the *Scott* reasoning, the officer's good faith in *DeFillippo* should have been disregarded, since the arrest might still have been found objectively unreasonable under the *Sibron* test. *Scott* was not mentioned in *DeFillippo*. Apparently the Court is willing to tolerate doctrinal inconsistencies in order to maximize law enforcement objectives. Between *DeFillippo* and *Scott* the government receives a double advantage in suppression hearings. *DeFillippo* permits the prosecutor to argue that no fourth amendment violation occurred because the police acted in good faith. *Scott* precludes the defendant from asserting even admitted bad faith on the part of the police to prove an abridgment of his fourth amendment rights.

116. *See* note 90 *supra*. Should the defendant succeed in negating a policeman's good faith claim, he will be confronted by Scott v. United States, 436 U.S. 128 (1978), which deprives him the benefit of a bad faith showing on the substantive issue. *See* note 115 *supra*.

erally their broad reading of the civil good faith defense standard[117] into fourth amendment content. If that occurs, strict probable cause in the criminal setting would give way to the relaxed requirement that police act in good faith, reasonably believing their conduct to be lawful.[118] Aware of the complexities inherent in search and seizure doctrine, a court applying such a broad standard would be unlikely to find unreasonable an officer's claimed good faith belief that probable cause existed.[119] The touchstone for validity of police conduct would be the officer's virtually irrefutable testimony that he believed his actions to be within the law.

V. CONCLUSION

It is regrettable that the Court was willing to gloss over longstanding principles of search and seizure doctrine to achieve the desired end in *DeFillippo*. Perhaps the outcome was not unexpected in light of recent Burger Court decisions[120] revealing a thinly veiled bias based upon law enforcement favoritism and exclusionary rule hostility. Yet the use of good faith reliance to deny that a fourth amendment violation took place was a needless encroachment on the substantive right. The Court should not frivolously sacrifice constitutional protections when it has available the equally effective and less fundamentally destructive alternative of withholding the exclusionary remedy.

117. *Pierson's* civil defense of "good faith and probable cause," 386 U.S. at 57, has been widely construed as requiring only that the police acted in good faith under the reasonable belief that their conduct comported with the law. *See, e.g.*, Reimer v. Short, 578 F.2d 621, 627 (5th Cir. 1978); Boscarino v. Nelson, 518 F.2d 879, 881–82 (7th Cir. 1975); Brubaker v. King, 505 F.2d 534, 536–37 (7th Cir. 1974); Street v. Surdyka, 492 F.2d 368, 373 (4th Cir. 1974); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1348 (1972). Under this liberal construction of *Pierson*, the focus of civil suits has shifted from *reasonableness* of police *conduct* as a matter of law, to *reasonableness* of the officer's *belief* in the legality of his acts. The probable cause component of the *Pierson* standard has simply been disregarded as surplusage. The lower courts' treatment of *Pierson* has been the subject of considerable criticism by commentators. *See* Thies, *supra* note 90, at 1000–26; Note, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 915, 939–41 (1978); Comment, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 TEMP. L. REV. 938, 945–63 (1976).

118. *See* note 117 *supra*.

119. The Chief Justice emphatically insists that "[p]olicemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 417 (1971)(Burger, C.J., dissenting). *See also* Stone v. Powell, 428 U.S. 465, 539–40 (1976) (White, J., dissenting).

120. *See, e.g.*, United States v. Caceres, 440 U.S. 741 (1979); Scott v. United States, 436 U.S. 128 (1978); United States v. Ceccolini, 435 U.S. 268 (1978); Zurcher v. Stanford Daily, 436 U.S. 457 (1978). *But see, e.g.*, Ybarra v. Illinois, 444 U.S. 85 (1979); Brown v. Texas, 443 U.S. 47 (1979).

Of most immediate concern to criminal defendants is lower court reaction to *DeFillippo*. One hopes that trial judges and appellate courts will respect the distinction between good faith in the civil and criminal contexts, decline to accept the Court's confused analogy to *Pierson v. Ray*, and refrain from unnecessarily extending the *DeFillippo* analysis. An appropriately measured response by the state and federal judiciary is essential to the preservation of resilient fourth amendment rights.

Even under the strictest reading of the case, however, the Court's artificial substantive-procedural distinction exposes fourth amendment safeguards to the practical pressure of local crime control needs. Personal privacy and autonomy are threatened with further erosion unless legislatures and city councils exercise self-restraint. Principled lawmakers must forego the "transparent expedient"[121] of inventing flimsy substantive offenses to facilitate the accomplishment of unconstitutional objectives.

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121. Michigan v. DeFillippo, 443 U.S. 31, 45 (1979)(Brennan, J., dissenting).