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COMMENTARY

Massachusetts v. Sheppard: When the Keeper Leads the Flock Astray — A Case of Good Faith or Harmless Error?

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In 1914, the United States Supreme Court held in *Weeks v. United States*[1] that evidence seized in violation of the fourth amendment is inadmissible in a federal trial. Few Supreme Court rulings have generated as much litigation and debate as the controversial *Weeks* decision.[2] In recent years, the exclusionary rule has come under increasing attack. Several courts and commentators have denounced the exclusionary rule as an imprudent judicial remedy which fails its intended purpose of deterring illegal police conduct.[3] Still others have criticized the exclusionary rule for undermining the truth-seeking process and freeing the guilty.[4]

Recently, in *United States v. Williams*,[5] the Court of Appeals for the Fifth Circuit voiced its dissatisfaction with the exclusionary rule in a more concrete form. In *Williams*, the Fifth Circuit held that a court should not exclude evidence where a police officer acts in the

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1 232 U.S. 383 (1914).

2 Nearly one-third of all trial-bound federal defendants file fourth amendment suppression motions. Of these, nearly 70% to 90% involve formal hearings. *See* COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 10 (1979).

3 *See, e.g.*, cases cited in note 12 *infra*; *see also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Canon, *The Exclusionary Rule: Have Critics Proven it Doesn't Deter Police?*, 62 JUDICATURE 398 (1979); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

4 *See, e.g.*, Irvine v. California, 347 U.S. 128 (1954); People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.); *see also* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215 (1978); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

5 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

"good faith" but mistaken belief that his conduct conforms with the fourth amendment.[6] Although other circuits have not followed *Williams'* lead,[7] the Fifth Circuit has not been alone in advocating a good faith exception to the exclusionary rule. The Attorney General of the United States strongly endorses *Williams* and the use of a good faith analysis in search and seizure cases.[8] In addition, two states have enacted statutory good faith exceptions to the exclusionary rule,[9] and legislation currently pending in Congress proposes a similar change at the federal level.[10]

Despite this increasing pressure, the Supreme Court has not adopted the good faith exception,[11] although a majority of the Court apparently favors modifying the existing exclusionary doctrine.[12]

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6 Sitting *en banc*, thirteen judges on the Fifth Circuit adopted an across-the-board good faith exception to the exclusionary rule which applies whenever the evidence "is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." *Id.* at 840.

7 *See, e.g.*, United States v. Alvarez-Porras, 643 F.2d 54 (2d Cir.), *cert. denied*, 454 U.S. 839 (1981); United States v. Thomas, 536 F. Supp. 736 (M.D. Ala. 1982).

8 In 1981, the Attorney General's Task Force on Violent Crime concluded 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 REPORT 55 (1981). More recently, in a speech before the Free Congress Education Foundation, Att. Gen. William French Smith voiced the Reagan administration's disapproval of an exclusionary rule which allows "demonstrably guilty" criminals to go free. Address by the Honorable William French Smith, Attorney General of the United States, Free Congress Research & Education Conference 3 (Sept. 27, 1983) (published by Dep't of Justice). Att. Gen. Smith also expressed the administration's approval of a good faith exception. *Id.*

9 ARIZ. REV. STAT. ANN. § 13-3925 (Supp. 1983) ("The trial court shall not suppress evidence which is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation."); COLO. REV. STAT. § 16-3-308 (Supp. 1983)(similar). For criticism of Colorado's good faith statute, see Note, *The Colorado Statutory Good Faith Exception to the Exclusionary Rule: A Step Too Far?*, 53 U. COLO. L. REV. 809 (1982). Recently, the Colorado Supreme Court refused to apply the good faith statute in People v. Quintero, 657 P.2d 948, *cert. granted*, 103 S. Ct. 3534, *cert. dismissed*, 104 S. Ct. 543 (1983). The Court interpreted the statutory good faith exception to cover "factual" errors by a police officer and not mistaken judgments of law. *Id* at 951. The Supreme Court granted certiorari in *Quintero*, but dismissed the case when the defendant died. *See* note 16 *infra*.

10 S. 2231, 97th Cong., 2d Sess. (1982); *see also The Exclusionary Rule Bills: Hearings Before the Subcomm. on the Criminal Law of the Senate Judiciary Comm.*, 97th Cong., 1st & 2d Sess. (1982).

11 *See, e.g.*, Taylor v. Alabama, 457 U.S. 687, 693 (1982); United States v. Johnson, 457 U.S. 537, 559-60 (1982). In both these recent decisions, the Supreme Court rejected the petitioners' arguments that the evidence should be admitted under a good faith modification of the exclusionary rule.

12 *See, e.g.*, California v. Minjares, 443 U.S. 916, 917 (1979) (Rehnquist, J., dissenting); Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 606 (1975) (Powell, J., concurring); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting). In addition, Justice

Last term, in *Illinois v. Gates*,[13] the Supreme Court bypassed a prime opportunity to decide the good faith question.[14] This term, however, the Supreme Court has granted certiorari in *Massachusetts v. Sheppard*[15] and two companion cases[16] which question whether the exclusionary rule should apply where a police officer seizes evidence pursuant to a defective search warrant. Given a majority of the Justice's disdain for the exclusionary rule in its present form, some modification of the exclusionary rule will likely occur. Exactly what form that modification will take remains to be seen.

This commentary focuses on the good faith exception and how it should apply in *Massachusetts v. Sheppard* and subsequent cases. Part I briefly sketches the historical development of the exclusionary rule and analyzes the Court's gradual narrowing of the scope of its application. The good faith exception espoused by Justice White in his concurring opinion in *Gates* is applied in Part II to the facts in *Massachusetts v. Sheppard*. Part III concludes by proposing a "harmless error" alternative to the good faith exception which would apply in cases involving unconstitutionally vague warrants.

I. Evolution of a Doctrine

A. *Case History*

Since the exclusionary rule's inception, the Supreme Court has continually debated the question of whether or not the rule is an implied constitutional mandate. Unlike the fifth amendment,[17] the

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O'Connor stated at her confirmation hearings that "the exclusionary rule sometimes interfered with the administration of justice by requiring the exclusion of evidence obtained through a technical error." N.Y. Times, Sept. 11, 1981, at 9, col. 3.

13 103 S. Ct. 2317 (1983).

14 After requesting that the parties brief the question of whether the exclusionary rule should be modified, a majority of the Court refused to reach the question because it had not been addressed at the trial court level. *Id.* at 2321. Only Justice White favored addressing the good faith question. *Id.* at 2336 (White, J., concurring); *see also* notes 63-73 *infra* and accompanying text.

15 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983).

16 United States v. Leon, 701 F.2d 187 (9th Cir.), *cert. granted*, 103 S. Ct. 3535 (1983); People v. Nunez, 658 P.2d 879, *cert. granted*, 104 S. Ct. 65 (1983). The Supreme Court also granted certiorari in another case, People v. Quintero, 657 P.2d 948, *cert. granted*, 103 S. Ct. 3535, *cert. dismissed*, 104 S. Ct. 543 (1983). However, the Court subsequently had to dismiss the case when the petitioner was killed. Telephone interview with Chief Justice William H. Erickson, Colorado Supreme Court (Jan. 10, 1984). Ironically, *Quintero* was probably the most significant of the four cases as it involved the question of good faith admissibility when a police officer is not acting pursuant to a search warrant.

17 The fifth amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

fourth amendment does not expressly provide for the exclusion of improperly seized evidence. The fourth amendment simply protects citizens from "unreasonable searches and seizures" and does not prescribe how courts should enforce this right.[18]

The Supreme Court's adoption of the exclusionary rule in *United States v. Weeks* marked the Court's first significant attempt to enforce fourth amendment rights.[19] Simply put, *Weeks* held that evidence seized in violation of the fourth amendment could not be introduced in a criminal trial. The *Weeks* exclusionary requirement only applied to federal law enforcement officers who seized evidence in violation of the fourth amendment.[20] The Court's strong language in *Weeks*[21] and its progeny implied the Court's perception of the exclusionary rule as a constitutional necessity. Justice Holmes, a member of the *Weeks* Court, later noted that without the exclusionary rule "the Fourth Amendment [is reduced] to a form of words."[22]

Thirty-three years after the *Weeks* decision, the Supreme Court temporarily retreated from its earlier characterization of the exclusionary rule as an implied constitutional mandate. In *Wolf v. Colorado*,[23] the Supreme Court held that the fourth amendment's prohibition against unreasonable searches and seizures applied equally to state and federal proceedings.[24] However, while extending the fourth amendment protections, the Court refused to impose the

18 The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no 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.

19 In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court had suggested in dictum that evidence seized in violation of the fourth amendment should not be admitted in court. This idea lay dormant for more than twenty years before the Supreme Court finally revived it in *Weeks*. For another early Supreme Court decision which discusses fourth amendment protections, see Adams v. New York, 192 U.S. 585 (1904).

20 At the time *Weeks* was decided, the fourth amendment was not yet applicable to the states. It was not until Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), that the Supreme Court recognized that fourth amendment rights are "implicit in the concept of ordered liberty" and therefore enforceable against the states through the due process clause of the fourteenth amendment.

21 Writing for a unanimous Court, Justice Day stated in *Weeks*:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value and . . . might as well be stricken from the Constitution.

232 U.S. at 393.

22 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

23 338 U.S. 25 (1949).

24 *Id.* at 27-29.

exclusionary rule on the states as an "essential ingredient" of the right.[25] The Court concluded that the exclusionary rule did not derive from the fourth amendment's "explicit requirements," but was merely a matter of "judicial implication."[26] Thus, the Court left the states free, after *Wolf*, to employ remedies other than the exclusionary rule which would be "equally effective" in enforcing fourth amendment guarantees.[27]

The Supreme Court's decision in *Wolf* not to impose the exclusionary rule on the states inadvertently created tension and confusion among state and federal courts.[28] Finally, in *Mapp v. Ohio*,[29] the Supreme Court rectified this situation by overruling *Wolf* and extending the exclusionary rule to the states. In so doing, the Supreme Court returned the exclusionary rule to its former status as a constitutionally mandated remedy.[30]

Following *Mapp*, courts applied the exclusionary rule in nearly every case involving a fourth amendment violation. Because the rule appeared constitutionally mandated, state courts felt compelled to routinely exclude evidence rather than risk Supreme Court reversal.[31] This rapid expansion of the rule's scope led many commentators to fear that the exclusionary rule had overreached its original purposes.[32] Nevertheless, courts continued to give the exclusionary rule an untempered application.

Finally, in 1971, the Supreme Court's decision in *Bivens v. Six*

25 *Id.* at 29.

26 *Id.* at 28.

27 *Id.* at 31. In a footnote, the Supreme Court listed various alternatives to the exclusionary rule which states could use as a means of enforcing fourth amendment rights. *Id.* at 30 n.1. Among those alternatives were common law and statutory civil suits against the searching officer. *Id.*

28 Following *Wolf*, several states adopted the exclusionary rule on their own initiative. *See* Elkins v. United States, 364 U.S. 206, 224-32 (1960) (appendix listing states which had adopted exclusionary rule). In those states that had not adopted the exclusionary rule, however, a controversy raged over whether a state official who illegally seized evidence could nevertheless have the evidence introduced in a federal court. This anomaly was promptly labeled the "silver platter" doctrine. *See* Lustig v. United States, 338 U.S. 74, 79 (1949). However, in *Elkins* the Supreme Court finally struck down the "silver platter" doctrine, holding that evidence unlawfully seized by state agents could no longer be admitted in federal court. 364 U.S. at 223-24.

29 367 U.S. 643 (1961).

30 In *Mapp*, the Court defined the exclusionary rule as an "essential part" of the fourth amendment's privacy right, for "[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." *Id.* at 656.

31 *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 2.02, at 18 (1980).

32 *See generally* Amsterdam, *supra* note 3; Kaplan, *supra* note 3; Oaks, *supra* note 3.

Unknown Named Agents marked a limit to unbridled judicial acceptance of the rule.[33] In *Bivens*, Chief Justice Burger mounted a scathing attack on the exclusionary rule in his sixteen page dissenting opinion.[34] While Chief Justice Burger did not advocate complete abandonment of the exclusionary rule, he suggested a "narrowing of its thrust so as to eliminate the anomalies it has produced."[35]

Chief Justice Burger's opinion acted as a catalyst for a gradual narrowing of the exclusionary rule's scope. Following *Bivens*, the Supreme Court began to curtail the exclusionary rule's application in various "peripheral" areas of fourth amendment law. The Court permitted evidence seized in violation of the fourth amendment to be admitted in grand jury proceedings,[36] in civil proceedings,[37] and at trial for impeachment purposes when the defendant elected to take the stand.[38] Moreover, the Court imposed tougher standing requirements on defendants who wished to challenge fourth amendment violations.[39] Finally, and quite significantly, the Court tightened its federal habeas corpus standards, thus limiting the number of state cases eligible for fourth amendment review.[40]

These reforms signaled the Burger Court's clear propensity to view the exclusionary rule as a "judge made rule" and not a constitu-

33 403 U.S. 388 (1971). In *Bivens*, agents of the Federal Bureau of Narcotics acting under claim of federal authority entered petitioner's residence and arrested him for alleged narcotics violations. *Id.* at 389. After threatening petitioner and his family, the officers proceeded to ransack the apartment looking for drugs. *Id.* Petitioner subsequently brought a civil suit in federal district court seeking monetary damages for the police officers' unconstitutional behavior. *Id.* at 389-90. A majority of the Supreme Court held that petitioner's complaint stated a federal cause of action under the fourth amendment for which damages could be recovered. *Id.* at 390-97.

34 In his dissent, Chief Justice Burger criticized the exclusionary rule for suppressing reliable evidence and freeing the guilty. Chief Justice Burger also called on Congress to enact a statutory remedy that would compensate innocent persons whose fourth amendment rights have been violated. *Id.* at 422-24 (Burger, C.J., dissenting).

35 *Id.* at 424.

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

37 United States v. Janis, 428 U.S. 433 (1976).

38 United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 62 (1954).

39 Rakas v. Illinois, 439 U.S. 128 (1978) (defendant does not have a legitimate expectation of privacy in the glove compartment or area under the seat of a car in which he is merely a passenger and, therefore, lacks standing to challenge an illegal search of those areas); Brown v. United States, 411 U.S. 223 (1973) (defendants who do not have a proprietary or possessory interest in the premises searched may not vicariously assert the owner's fourth amendment interests in contesting admission of improperly seized goods).

40 Stone v. Powell, 428 U.S. 465 (1976) (denying a state prisioner federal collateral review where he has had a "full and fair opportunity" to litigate his fourth amendment claim in the state court).

tionally mandated remedy.[41] As the cases above illustrate, in a growing number of situations the Court has allowed the use of evidence siezed in violation of the fourth amendment. In this gradual process of "deconstitutionalizing" the exclusionary rule, the Court has also narrowed the underlying rationales on which the rule is based.

B. *Traditional Rationales: Deterrence and Judicial Integrity*

Two distinct justifications have traditionally been advanced in support of the exclusionary rule — one factual and the other normative.[42] The exclusionary rule's factual justification is deterrence of illegal police behavior. The Supreme Court first acknowledged the rule's deterrent function in *Wolf v. Colorado*.[43] Since *Wolf*, the Court has repeatedly cited deterrence as the exclusionary rule's primary objective.[44] Although proposed as an alternative factual justification by some commentators, the Court has refused to recognize the exclusionary rule as a means of redressing the injury to the privacy of the individual search victim.[45] At best, the individual citizen stands as an incidental beneficiary of a court's decision to suppress evidence.

The normative justification traditionally mentioned for applying the exclusionary rule is the imperative of "judicial integrity." Justice Brandeis suggested that a government which uses illegally obtained evidence to secure a conviction "breeds contempt for law."[46] While frequently alluded to,[47] the Court has never seen judicial integrity as an independent justification for excluding evidence.[48] In recent years, the deterrence rationale has by far been the preeminent justification for invoking the exclusionary rule. Indeed, the Court has listed the deterrence rationale as the major reason for limiting the exclusionary rule's scope, refusing to apply the rule where its deterrent objectives are not served.[49] Two recent cases, *Michigan v. DeFillippo*[50] and *United States v. Peltier*,[51] illustrate this refusal to in-

41 *See, e.g.*, United States v. Peltier, 422 U.S. 531, 538 (1975).

42 *See* Oaks, *supra* note 3, at 668.

43 In *Wolf*, the Court acknowledged that "the exclusion of evidence may be an effective way of deterring unreasonable searches." 338 U.S. at 31.

44 *See, e.g.*, United States v. Peltier, 422 U.S. 531, 538-39 (1975); Michigan v. Tucker, 417 U.S. 433, 447 (1974); Linkletter v. Walker, 381 U.S. 618, 637 (1965).

45 *See* United States v. Calandra, 414 U.S. at 347.

46 Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

47 *See, e.g.*, United States v. Peltier, 422 U.S. at 537-38; Terry v. Ohio, 392 U.S. 1, 13 (1968); Elkins v. United States, 364 U.S. 206, 222 (1960).

48 *See* Oaks, *supra* note 3, at 669-70.

49 *See* note 44 *supra*.

50 443 U.S. 31 (1979).

51 422 U.S. 531 (1975).

voke the exclusionary rule where police deterrence cannot be furthered. In these cases, the Supreme Court has laid the theoretical foundation for a good faith exception to the exclusionary rule.

C. Peltier *and* Defillippo: *"True" Good Faith Reliance*

The Supreme Court has refused to invoke the exclusionary rule when the police seize evidence pursuant to a validly enacted statute which a court later declares unconstitutional. In *Peltier*, for example, police officers conducting a standard "roving patrol" search uncovered a large quantity of marijuana in the defendant's car.[52] The trial court denied Peltier's motion to suppress the evidence.[53] Shortly after the suppression ruling, however, the Supreme Court decided *Almeida-Sanchez v. United States*[54] which held that "roving patrol" searches violate fourth amendment strictures. On appeal, Peltier urged that *Almeida-Sanchez* be given retroactive effect.[55]

The Supreme Court rejected Peltier's argument and upheld the trial court's suppression ruling. Writing for the majority, Justice Rehnquist stressed that the exclusionary rule should be invoked only where police deterrence can actually be achieved.[56] Justice Rehnquist added that evidence should be suppressed only where a police officer has knowledge, or should have knowledge of, his unconstitutional behavior.[57] An officer cannot be charged with this knowledge when he acts "upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval."[58]

Similarly, in *Michigan v. DeFillippo*, the Supreme Court refused to suppress evidence seized pursuant to an ordinance which was subsequently found unconstitutionally vague.[59] Applying logic similar to that used in *Peltier*, the Court noted that it could not expect a

52 422 U.S. at 532. The police officers who stopped and searched the defendant's car were acting pursuant to a federal statute, 8 U.S.C. § 1357(a)(3)(1976), which authorized warrantless automobile searches within a "reasonable distance" of the United States' border. 422 U.S. at 539-40.

53 *Id.* at 532.

54 413 U.S. 266 (1973).

55 422 U.S. at 532.

56 Justice Rehnquist stated: " '[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purposes would not be served.' " *Id.* at 538 (quoting Desist v. United States, 394 U.S. 244, 254 n.24 (1969)).

57 *Id.* at 542.

58 *Id.* at 541.

59 443 U.S. at 31.

"prudent" officer to foresee a court later finding the ordinance unconstitutional."[60]

At best, *Peltier* and *DeFillippo* have only a marginal impact on the exclusionary rule's application. The two decisions only apply to cases where a police officer acts in good faith reliance on a law which is "presumptively valid" at the time of the search. However, while carefully limited to their facts,[61] the cases do illustrate the Burger Court's general reluctance to invoke the exclusionary rule when a police officer conducts his search in good faith. To date, the Supreme Court has not extended this "good faith" analysis to other areas, such as searches conducted in good faith reliance on a defective warrant. It is this situation which confronts the Court in *Massachusetts v. Sheppard*.[62] The following section discusses how the good faith exception could apply in *Sheppard* and similar types of cases.

II. Good Faith and *Sheppard*

A. Illinois v. Gates: *Justice White's Good Faith Proposal*

Last Term, in *Illinois v. Gates*,[63] the Supreme Court heard oral arguments on whether it should recognize a good faith exception to the exclusionary rule in cases where a police officer seizes evidence pursuant to a defective warrant.[64] A majority of the Court, however, refused to reach the good faith question after finding that Gates' fourth amendment rights had not been violated.[65] Only Justice White felt the time and situation appropriate to address the good

60 *Id.* at 37-38.

61 The *DeFillippo* holding only applies to arrest statutes which do not, by their terms, violate fourth amendment guarantees. The decision does not apply to statutes which authorize searches in violation of fourth amendment rights. In those circumstances, the exclusionary rule still applies regardless of the police officer's reliance. *See, e.g.*, Sibron v. New York, 392 U.S. 40 (1968); Berger v. New York, 388 U.S. 41 (1967).

62 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983).

63 103 S. Ct. 2317 (1983).

64 In *Gates*, police officers received an anonymous letter informing them of the defendant's drug related activity. The letter described the procedure by which Gates routinely transported narcotics from Florida to Illinois. After further investigation, which confirmed this tip, the Illinois police obtained a warrant to search the Gates' home and automobile. A subsequent search uncovered 350 pounds of marijuana in the trunk of the Gates' automobile, and a search of their home revealed marijuana, weapons, and other contraband. *Id.* at 2325-26.

65 In reaching its decision, the Supreme Court replaced the "two-pronged" test for determining probable cause from an informant's tip with a "totality of the circumstances" approach. *Id.* at 2328-36; *see* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). Using this more flexible standard, the Court concluded in *Gates* that there was sufficient probable cause to support the warrant. 103 S. Ct. at 2334-36.

faith issue.[66]

In his concurring opinion, Justice White outlined the salient reasons justifying a good faith exception. Justice White denounced the exclusionary rule for suppressing "inherently trustworthy" evidence and generating disrespect for the judicial system.[67] Given its heavy costs, Justice White suggested limiting the exclusionary rule to those areas where its purposes would be most effectively served.[68] Noting that police deterrence is the exclusionary rule's primary objective, White added that the deterrence rationale loses much of its force where the police officer acts in the good faith but mistaken belief that his conduct comports with fourth amendment requirements.[69] In such cases, "the deterrent function of the exclusionary rule is so minimal, if not non-existent, that the balance clearly favors the rule's modification."[70]

Extending his analysis to the *Gates* facts, Justice White noted that the best argument for the good faith exception arises where a police officer acts pursuant to a search warrant which is later declared unconstitutional.[71] In such cases, the police officer has done everything conceivable to comply with constitutional prerequisites and fourth amendment interests will not be advanced by excluding the evidence.[72]

Justice White stopped short, however, of endorsing a blanket rule of admissibility for evidence seized pursuant to a defective warrant. Justice White favored retaining the exclusionary rule in those instances where its deterrent objectives could still be served. Specifically, Justice White would apply the exclusionary rule in three situations: (1) where a magistrate or judge plainly had "no business" issuing a warrant; (2) where a magistrate or judge relied on false or misleading information; and (3) where the warrant clearly lacks a probable cause basis.[73] In these instances, exclusion of the evidence would still serve a deterrent purpose, even though a warrant had been issued.

Currently, Justice White's good faith exception stands as a

66 Justice White also concurred with the majority's finding that the defendant's fourth amendment rights had not been violated. However, Justice White did not favor the Court's decision to abandon *Aguilar* and *Spinelli* to reach this result. 103 S. Ct. at 2347.

67 *Id.* at 2340.

68 *Id.* at 2341 (citing United States v. Calandra, 414 U.S. 338 (1974)).

69 *Id.* at 2343-44.

70 *Id.* at 2344.

71 *Id.*

72 *Id.* at 2345.

73 *Id.* at 2345-46.

promising proposal, the specific contours of which have not been fully explored. As *Gates* demonstrates, the Court has been reluctant to directly confront the good faith issue. However, *Massachusetts v. Sheppard*,[74] a case currently pending before the Supreme Court, affords the Court a convenient opportunity to consider Justice White's good faith proposal.

B. Massachusetts v. Sheppard: *Applying the Good Faith Exception*

Massachusetts v. Sheppard presents an apt setting in which to debate the good faith exception. In *Sheppard*, police officers investigating a macabre murder[75] obtained substantial evidence linking the defendant to the crime.[76] Armed with this information, the police sought an arrest warrant and a warrant to search Sheppard's residence.[77] An experienced police officer[78] prepared an affidavit explaining the incriminating information gathered against the defendant and listing the evidence the police sought to recover in the search.[79] The district attorney, his first assistant, and a police sergeant all examined the affidavit and concluded that it established probable cause to seek a warrant.[80]

The officer then attempted to procure a proper warrant for a search.[81] As it was Sunday, no clerks or assistants were available to

74 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983).

75 In *Sheppard*, police officers discovered the victim's severely beaten and burned body in a vacant lot in the Boston area. 441 N.E.2d at 726. Pieces of wire were found attached to the victim's leg and lying near her body. Further investigation revealed the victim's identification and led police officers to the defendant, Jimmy Sheppard, who had been identified as the victim's boyfriend. *Id.* A police officer eventually located Sheppard who voluntarily agreed to accompany the officer to the police station. In response to questions, Sheppard informed the police that he had been at a "gaming house" the entire night of the murder and had neither left the house nor seen the victim. *Id.* at 726-27.

After talking with various patrons, however, the police learned that Sheppard had borrowed an automobile and left the "gaming house" between 3 a.m. and 5 a.m. *Id.* at 727. With the owner's permission, the police inspected the automobile and found bloodstains in the trunk compartment and on the bumper. The owner informed police that the blood had not been present before he had loaned his car to Sheppard. *Id.* Based on this information, the police then attempted to procure a warrant. *Id.*

76 The Massachusetts Supreme Judicial Court unanimously agreed that the police had established probable cause linking the defendant to the murder. *Id.* at 733, 737 (Liacos, J., concurring), 745 (Lynch, J., dissenting).

77 *Id.* at 727.

78 The investigating police officer in *Sheppard* had nineteen years of experience, ten of which had been as a detective. *Id.* at 738 (Liacos, J., concurring).

79 *Id.* at 727.

80 *Id.*

81 *Id.* at 728.

assist him.[82] Unable to find a suitable warrant, the officer modified a standard "controlled substances" form for his purposes.[83]

The officer then presented the affidavit and warrants to a judge who determined that probable cause existed for both warrants.[84] After making some minor changes,[85] the judge dated and signed the warrants.[86] The judge did not alter the substantive portion of the search warrant (which merely authorized the police to search for "controlled substances"), nor did he attach or incorporate by reference the officer's affidavit describing the articles the police actually hoped to seize.[87]

Relying on the apparent propriety of the altered warrant, the police searched the defendant's residence,[88] recovering bloodstained clothing and other evidence linking Sheppard to the murder.[89] At trial, the judge denied the defendant's motion to suppress the evidence. Although he acknowledged that the defective warrant violated the fourth amendment,[90] the trial judge refused to invoke the exclusionary rule given the police officer's apparent good faith ef-

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82 *Id.*

83 According to the evidence adduced at trial, the police officer:

> [C]rossed out the words "controlled substance" on the cover side of the form. On the face side, he replaced the word "Dorchester" with the word "Roxbury." He inserted a reference to "2nd & Basement" of 42 Deckard Street as the place of the search. However, the reference to "controlled substance" was not deleted in those portions of the form that constituted the application for a search warrant and would constitute the warrant itself.

Id.

84 *Id.*

85 According to Petitioner's Brief:

> [T]he judge crossed out with a pen the name of the Chief Justice of the Dorchester Court . . . and crossed out the printed word "Dorchester" in the clause, and substituted his own name and the name of the court of the jurisdiction in which the warrant was sought . . . . On the cover side he struck the words "Dorchester District" and substituted "Roxbury Division Mass. Trial Court . . . ."

Brief for the Petitioner at 7, Massachusetts v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983).

86 441 N.E.2d at 728.

87 *Id.*

88 When the police arrived at the defendant's residence, the defendant was not present. However, Sheppard's mother and sister were present. The police showed the warrant to Sheppard's mother and sister before they conducted the search. *Id.*

89 The items seized included: bloodstained black boots, chips of dried blood, two unmatched women's earrings, a bloodstained envelope, bloodstained men's shorts, women's leotards, three types of wire and a women's hair piece. The officers apparently did not search beyond the geographic area listed in the affidavit, nor did the officers seize evidence unrelated to the homicide. *Id.* at 728-29.

90 *Id.* at 730.

forts.[91] In an extensive opinion, the Massachusetts Supreme Judicial Court reversed, finding that the exclusionary rule required suppression of the evidence.[92] The Supreme Court subsequently granted certiorari on the question of whether the exclusionary rule should apply where the police rely in good faith on a defective warrant.[93]

C. *The Good Faith Test: A Subjective and Objective Analysis*

Sheppard provides an ideal setting for discussing the subjective and objective aspects of the good faith exception. In many respects, *Sheppard* presents an ironic twist to the conventional dispute over subjective and objective reliance. As its proponents suggest, to satisfy good faith requirements the police officer's conduct should satisfy both subjective and objective standards.[94] In other words, not only must the police officer possess a subjective good faith belief in the propriety of his actions, but that belief must also be "grounded in objective reasonableness."[95] Critics of the good faith exception quickly point out the inherent difficulty of determining good faith.[96] *Sheppard*, however, illustrates how a court could easily make a good faith determination in some cases.

The conduct of the police officers in *Sheppard* does not demonstrate a wicked or evil intent. To the contrary, their investigatory efforts comport with those of conscientious law enforcement officers concerned with following proper police procedure.[97] After obtaining sufficient information to support their suspicions, the officers presented their case to a judge to obtain official sanction for their search. Furthermore, the officers conducted the actual search in a manner which demonstrates an absence of malicious intent. At no time, it appears, did the police exceed the bounds of the affidavit in either the areas searched or the items seized.[98] Based on these fac-

91 *Id.*

92 *Id.* at 725-36. Writing for a plurality of a sharply divided court, Justice Wilkins doubted whether the exclusionary rule would deter a police officer who has acted in good faith reliance on a defective warrant. Nevertheless, he felt constrained by Supreme Court precedent to suppress the evidence that the police had seized. *Id.*

93 Massachusetts v. Sheppard, 103 S. Ct. 3534 (1983).

94 *See* Illinois v. Gates, 103 S. Ct. 2317, 2344 n.15 (1983) (White, J., concurring); United States v. Williams, 622 F.2d 830, 841 n.4a (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

95 622 F.2d at 841 n.4a.

96 1 W. LAFAVE, SEARCH AND SEIZURE § 1.2, at 3-19 (Supp. 1984) [hereinafter cited as LAFAVE].

97 *See* notes 76-84 *supra* and accompanying text.

98 *See* note 89 *supra*.

tors, it can hardly be said that the police did not act in subjective good faith.

Thus, for their actions to fail the good faith test, it must be because of an absence of objective good faith. In this analysis, the question arises whether a police officer acts with objective good faith, or "reasonably," by seizing items not specifically named on the warrant's face. An inerudite response would suggest that he has not. Undoubtedly, a warrant acts as a judicial restraint on the police officer's authority to execute the search.[99] By limiting the scope of the search to those areas and items specifically stated, the warrant minimizes the intrusive nature of the officer's actions. When an officer ignores the warrant or exceeds its bounds, his conduct appears, at first blush, to have not been "reasonable." Accordingly, the good faith exception should not apply.

While appealing, the above argument is both shortsighted and misleading. First, it ignores the many situations in which a police officer acts in an objectively reasonable manner in seizing evidence not specifically mentioned in the warrant. For example, under the "plain view" doctrine an officer need not ignore relevant evidence he might inadvertently spot, even though the warrant does not expressly authorize its seizure.[100] Second, and most important, the analysis evades the central focus of the good faith inquiry. The court's inquiry under the exception should include *all* factors bearing on the officer's good faith, not simply his adherence to the judicially-issued document itself. Indeed, it would have been unreasonable for the investigating officer in *Sheppard* to conduct the search in strict accordance with language on the warrant's face. Rather, a "reasonable" police officer in this situation would rely on what the judge had seemingly authorized by adapting and signing the warrant — a search of the defendant's premises for the items listed in the affidavit.

D. *Good Faith and the "Magistrate Shopping" Syndrome*

By its nature, the good faith exception requires a court to determine whether or not a police officer's conduct has been objectiona-

99 *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85 (1979); Lo-Ji Sales v. New York, 442 U.S. 319 (1979); Marron v. United States, 275 U.S. 192 (1927); Boyd v. United States, 116 U.S. 616 (1886).

100 For cases discussing the "plain view" doctrine, see, e.g., Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. Truitt 521 F.2d 1174 (6th Cir. 1975). Some circuit courts have also found that various contraband and other items pertaining to the crime may be seized even though they are not specifically mentioned in the warrant. *See, e.g.*, United States v. Bridges, 419 F.2d 963 (8th Cir. 1969); *see also* C. WHITEBREAD, *supra* note 31, at 121.

ble. Where the police officer engages in objectionable conduct, then the good faith exception does not apply. Critics argue, however, that a good faith exception would, in itself, promote rather than dissuade objectionable police behavior.[101] A good faith exception, critics argue, would foster a "careless attitude" in police officers toward following proper police procedure.[102]

One specific objection voiced by the critics is that the good faith exception would promote "magistrate shopping," or instances where a police officer intentionally seeks a lenient judge to issue the warrant.[103] Conceivably, this problem could arise in cases where the police have only marginal evidence against the defendant. In such a case, a police officer might prefer one magistrate over another given their different propensities in finding probable cause.[104] While potentially a problem, Justice White's good faith proposal has safeguards to prevent this occurrence. Under Justice White's proposal, a court could still exclude evidence in certain situations, even though a warrant has been issued. For example, where a magistrate plainly has "no business" issuing a warrant, or issues a warrant where probable cause is plainly lacking, the exclusionary rule could still be invoked.[105] Retention of the exclusionary rule in these cases removes any advantage a police officer might have in seeking a lenient judge.

Whatever merit the "magistrate shopping" argument might have, it clearly does not apply to cases like *Sheppard* where the police have gathered substantial probable cause to support a warrant. Through their extensive investigatory work, the police in *Sheppard* had established a strong case against the defendant. Witnesses had been interviewed and alibis rebuffed. All of the evidence pointed to the defendant as the perpetrator of the crime.[106] The district attorney had examined the evidence and concluded that the police had probable cause to support a warrant. Under these circumstances, even the staunchest defender of fourth amendment liberties would have issued a warrant.[107] Thus, in light of the officer's solid case, it

101 *See, e.g.*, 1 W. LAFAVE, *supra* note 96, at 15-16 (Supp. 1984).

102 *Id.* at 16.

103 *See, e.g.*, Oral Argument in United States v. Leon, 701 F.2d 187 (9th Cir.), *cert. granted*, 103 S. Ct. 3535 (1983), at 52 U.S.L.W. 3543 (U.S. Jan. 24, 1984).

104 *See, e.g.*, L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 120, 204 (1967).

105 *See* 103 S. Ct. at 2345-46. For further discussion of Justice White's good faith proposal, see notes 66-74 *supra* and accompanying text.

106 *See* note 75 *supra*.

107 The probable cause showing was so evident that it received only a cursory discussion by the Massachusetts Supreme Court on appeal. *See* note 76 *supra*.

can hardly be said that they had an incentive to "hedge" the facts or seek a lenient magistrate. Rather, given the "high stakes" involved in *Sheppard*, the police would have had the exact opposite motivation. Like any individual, a police officer does not want his hard work and efforts to go to waste. The police had expended many hours of investigatory work to get to the defendant's doorstep. Any conscientious police officer in this situation would probably prefer a competent magistrate, ensuring that any evidence obtained in the search would not be suppressed due to a defective warrant.

III. An Alternative "Harmless Error" Proposal

As the above analysis indicates, the good faith exception provides one possible means of avoiding the otherwise harsh results of the exclusionary rule in cases like *Sheppard*. However persuasive the good faith exception might be, it should not preclude consideration of potentially more viable proposals. Accordingly, this section proposes a "harmless error" alternative which could make it unnecessary for a court to even reach the good faith question in cases involving facially defective warrants.[108]

A good faith exception inherently requires that a court make cumbersome inquiries into a police officer's subjective and objective good faith. Such inquiries could further burden already overloaded courts. A "harmless error" rule, which would focus on the actual impact of the unconstitutional warrant on the defendant's fourth amendment rights, could avoid these burdens.

Traditionally, the harmless error rule has been used as an appellate device to restrict the exclusionary rule's application in fourth amendment cases under review.[109] The harmless error doctrine allows an appellate court to uphold a conviction where the admission of unconstitutionally seized evidence did not significantly prejudice the defendant's interests at trial.[110] The Supreme Court could extend the harmless error reasoning to the trial court level and the initial suppression determination. At the suppression hearing, the trial judge could determine whether the facially "unconstitutional" war-

108 The harmless error exception would be an intermediate step that a court would apply after finding that the warrant violated fourth amendment particularity requirements, but before determining whether the police acted in good faith.

109 Chambers v. Maroney, 399 U.S. 42 (1970); Fahy v. Connecticut, 375 U.S. 85 (1963); *see also* 1 W. LAFAVE, *supra* note 96, at 735.

110 *See, e.g.*, Milton v. Wainwright, 407 U.S. 371 (1972) (involving improper pretrial confession); Schneble v. Florida, 405 U.S. 427 (1972) (involving an erroneously admitted confession); *see also* 1 W. LAFAVE, *supra* note 96, at 735-49.

rant *in fact* prejudiced the defendant's fourth amendment rights. If not, then the court would not invoke the exclusionary rule.

An advantage of a harmless error exception would be its limited application. Courts would only apply the exception to cases, like *Sheppard*, where the police have acted pursuant to a facially defective search warrant.[111] Moreover, the harmless error exception would apply only where the warrant's defect did not significantly prejudice the defendant's fourth amendment interests. Similar to the traditional harmless error doctrine,[112] the state would bear the burden of proving a harmless result.[113]

Sheppard illustrates the kind of case in which a court could apply a "harmless error" exception. While the warrant in *Sheppard* failed to pass constitutional muster, that failure did not actually prejudice the defendant's rights. Undoubtedly, the police officers in *Sheppard* had probable cause to support their warrant.[114] However, Sheppard objected to the judge's failure to state in the warrant the particular items to be seized, as required by the fourth amendment.[115] Assuming the warrant in *Sheppard* thereby violated fourth amendment requirements,[116] the court should next inquire, under a harmless error rule, whether the defendant suffered any actual "harm" as a result of this violation. In making this determination, a court must consider the rights protected by the warrant clause. Essentially, the particularity requirement of the warrant clause serves two major functions: (1) it places the person subject to the seizure on notice as to what the

111 The authors do not advocate extending the harmless error rule to warrants issued on insufficient probable cause. Such warrants inherently "harm" the defendant's fourth amendment interests given the insufficient factual justification to support the police officer's intrusion in the first instance. Rather, the admissibility of evidence in these circumstances should be governed by the good faith exception discussed in Part II *supra*.

112 *See* Chapman v. California, 386 U.S. 18 (1967).

113 The "harm" at issue is the harm to the defendant's fourth amendment rights and not the harm in having the evidence admitted at trial. The difference is one between right and remedy. The defendant does not have the constitutional right to have the evidence illegally seized from his home excluded at trial. *See* United States v. Calandra, 414 U.S. 338 (1974). He has only the constitutional right to be free from searches and seizures that do not conform to the fourth amendment's requirements. If the search does not so conform, and if deterrence can be served, only then does the exclusionary remedy apply.

114 *See* notes 76 and 106 *supra*.

115 *See* notes 84-87 *supra* and accompanying text.

116 During oral argument in *Sheppard*, some of the Justices asked questions suggesting that perhaps no constitutional violation occurred at all. 52 U.S.L.W. 3541-42 (U.S. Jan. 24, 1984). Such a finding, however, would not only be inconsistent with the Massachusetts Supreme Court's characterization of the warrant, 441 N.E.2d at 732, but also contrary to existing Supreme Court precedent. *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 92 n.4 (1979); Marron v. United States, 275 U.S. 192, 196 (1927).

officer is entitled to seize; and (2) it protects the individual against "general searches" by limiting the search to those areas and items specifically stated in the warrant.[117]

Viewed in this light, Sheppard did not suffer any injury as a consequence of the facially defective warrant. First, while defective, the warrant did not actually prejudice the defendant by failing to put him on notice. The defendant was not present when the police arrived at his house.[118] He therefore cannot complain that the defective warrant failed to provide him with adequate notice.[119]

Second, and most important, the actual *manner* in which the police conducted their search did not harm the defendant's fourth amendment rights. The officers never exceeded the bounds specified in their affidavit.[120] They searched only those places (i.e. the second floor and the basement) specifically authorized by the warrant and seized only those items relevant to the homicide.[121] They neither "rummaged" through the defendant's belongings nor seized evidence which they did not have probable cause to seize.[122] In short, none of the abuses commonly associated with an unconstitutionally vague warrant actually occurred in *Sheppard*.[123]

Applying a "harmless error" rule in cases involving facially defective warrants would not constitute a sharp departure from existing search and seizure doctrine. Indeed, courts already recognize a similar type of exception in wiretap cases involving facially defective court orders.[124] In these cases, courts have recognized that facial de-

117 *See* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

118 According to the Massachusetts Supreme Court's opinion:

> At about 5 P.M. Detective O'Malley and others were admitted to 42 Deckard Street. Detective O'Malley spoke with the defendant's mother and sister, showed them the warrant, and said *the police were going to look in the defendant's room and in the cellar for things that were implicated in a homicide.* It does not appear that either of the two women read the warrant or asked to have it read.

441 N.E.2d at 728 (emphasis added).

119 *Id.* Even to the extent the notice requirement extends to other individuals on the premises, they also would not have a valid complaint. The police told the defendant's mother and sister of both the search's purpose and parameters. The mother and sister's failure to read the warrant and notice its shortcomings should not constitute grounds for suppressing the evidence.

120 *Id.* at 728-29.

121 *Id.* at 745 (Lynch, J., dissenting).

122 *See* notes 89 and 98 *supra* and accompanying text.

123 *See, e.g.*, *Coolidge*, 403 U.S. at 467. In discussing the abuses the warrant clause is aimed at preventing, the Supreme Court stated in *Coolidge*: "[T]he specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings." *Id.*

124 United States v. Chavez, 416 U.S. 562 (1974); *see also* United States v. Acon, 513 F.2d

fects in the wiretap order do not constitute automatic grounds for suppression, especially where the actual wiretap has been conducted in a reasonable manner.

In summary, applying a "harmless error" exception in cases like *Sheppard* would allow judges to make more equitable suppression rulings. The harmless error rule strikes a needed balance between the constitutional imperatives of the warrant clause and the harsh consequences of invoking the exclusionary rule. By recognizing the warrant's constitutional deficiencies, the harmless error rule preserves the historical importance of the fourth amendment's particularity command.[125] At the same time, however, the harmless error exception gives trial judges necessary leeway to avoid excluding probative evidence where the defendant's fourth amendment rights suffered no actual harm.

In addition to striking this balance, the harmless error exception also hits at the central problem in these cases: judicial negligence in issuing a defective warrant. Unquestionably, the party at fault in cases like *Sheppard* is not the investigating police officer, but rather the judge or magistrate who issued the defective warrant. By focusing exclusively on the police officer's conduct, the good faith exception "glosses over" the judicial blunder in its rush to find the evidence admissible. In contrast, the harmless error rule directly addresses the judge's error in determining whether or not that error significantly affected the defendant's rights. This overt recognition of judicial error would reprimand the issuing judge for his mistake as well as educate other members of the judiciary of the constitutional imperatives of precision and specificity in issuing warrants.

IV. Conclusion

Since its inception, the exclusionary rule has been the target of continuous criticism. Much of this criticism has, of course, been justified. Unquestionably, the exclusionary rule exacts a heavy price on

513 (3d Cir. 1975) (wire tap order improperly signed by an assistant attorney general); United States v. Poeta, 455 F.2d 117 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) (where issuing judge inadvertently crossed out the wrong paragraph on standardized wiretap order); United States v. Ceraso, 467 F.2d 647 (3d Cir. 1972) (attorney general merely initialed wiretap order and did not sign it).

125 Thus, application of a harmless error exception would be more advantageous than a simple finding that no constitutional violation occurred. By recognizing the warrant's constitutional deficiency, a trial court could send a message to the issuing judge informing him of his error and instructing him, on the constitutional importance of listing items with particularity.

the administration of criminal justice. Each time a court invokes the rule, probative and reliable evidence is kept from the trier of fact. In the process, the exclusionary rule circumvents the truth-seeking process and often frees the guilty.

However, to criticize a doctrine is one thing, to offer constructive substitutes and alternatives is another. Despite its deficiencies, the exclusionary rule plays a beneficial role in protecting fourth amendment rights, standing as a judicial commitment to the deterrence of unconstitutional police behavior. The exclusion of illegally seized evidence also acknowledges both the importance and inviolability of the individual citizen's privacy right. Any proposed alternative or modification of the present exclusionary doctrine must also recognize these important objectives.

The good faith exception presents one such possible alternative. By retaining the exclusionary rule in instances where police misconduct can be deterred, the good faith exception seeks a balance between effective law enforcement and protection of individual liberty interests. While appealing, the good faith exception is not a panacea for all fourth amendment violations and should not preclude consideration of other, possibly more effective, proposals.

Accordingly, a harmless error alternative could apply in cases involving facially defective warrants. In these cases, applying a good faith exception unnecessarily skews the court's inquiry. By focusing exclusively on the police officer's conduct, the good faith exception diverts the court's attention from the real errant party — the judge or magistrate who issued the warrant. Applying a good faith test in these circumstances does very little to educate the issuing judge or magistrate on his error.

By applying a harmless error rule in these situations, a court could better educate the judge or magistrate on the constitutional significance of his mistake. At the same time, the harmless error rule removes the shackles which had previously required that a trial judge automatically suppress the evidence in these cases, even though the defendant's fourth amendment rights had not been actually harmed. In short, a harmless error exception could help to calm what has traditionally been a troubled area in fourth amendment law.